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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 143

STANLEY MARKIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES HANKEN
PHILIP BAROFF
240 Fairfield Avenue
Bridgeport, Connecticut

ALFRED BELINKIE
1016 Broad Street
Bridgeport, Connecticut

Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Stanley Markis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on October 29, 1965.

Opinions of the Court Below

The opinion of the Court of Appeals, as yet unreported, is printed in the Appendix to this Petition (P.A. 1a).[1] The opinions in *U.S.* v. *Piccioli*, Docket No. 29521 in the

[1] References are indicated as follows:
References to the numbered pages of petitioner's appendix (P.A. —a).
Reference to the numbered pages of the appendix to Court of Appeals (A. —a).
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Court of Appeals, *U.S.* v. *Grassia,* Docket No. 29791 in the Court of Appeals, *U.S.* v. *Costello, Marchetti* and *Gjanci,* Docket No. 29524 in the Court of Appeals, *U.S.* v. *Costello,* Docket No. 29525 in the Court of Appeals, *U.S.* v. *Marchetti,* Docket No. 29526 in the Court of Appeals, and *U.S.* v. *Gjanci,* Docket No. 29527 in the Court of Appeals, related cases, also are printed in the Appendix (P.A. 28a, 36a, 13a).

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on October 29, 1965. Petitioner's Petition for rehearing was denied on November 26, 1965. This Petition is filed within 30 days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Should *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax laws here involved, be reconsidered by this Court in the light of recent decisions?

2. Is it not reversible error to refuse to instruct as to the lesser-included offense under Rule 31(c), Federal Rules of Criminal Procedure, when the requirements for such instruction are met, as defined by *Sparf* v. *U.S.,* 156 U.S. 51 (1895); *Stevenson* v. *U.S.,* 162 U.S. 315 (1896), and *Sansone* v. *U.S.,* 380 U.S. 343 (1965)?

3. Since *Giordenello* v. *United States*, 357 U.S. 480 (1958) clearly held that essential facts supporting "probable cause" must appear on the face of an arrest complaint, did not the Court below err in deciding that such facts, although not appearing in the complaint may be found in affidavits executed four days prior to the complaint?

4. Has not petitioner been denied his right under the constitution to be confronted with the witnesses against him, when the basis for his conviction rests upon the extra judicial statements of a declarant who was not subject to cross-examination?

5. Is *Marron* v. *United States*, 275 U.S. 192 (1927) authority for holding that rent receipts and telephone bills may be seized by virtue of F.R.Cr.P. 41(b)(2) as "instrumentalities of the crime" of accepting wagers without having registered or paid the tax and, if so, should the decision be reconsidered by this Court in the light of recent decisions?

6. Assuming, *arguendo*, the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

Statutes, Rules, Constitutional Provisions, and Regulations Involved

68A Stat. 525 (1954), 26 U.S.C. § 4401 (1958): *Imposition of tax*

(a) Wagers—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U.S.C. § 4411 (1958): *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U.S.C. § 4412 (1958): *Registration*

(a) Requirement—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information—In accordance with regulations prescribed by the Secretary, he or his dele-

gate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 851 (1954), 26 U.S.C. § 7203 (1958): *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. § 7262. *Violation of occupational tax laws relating to wagering—failure to pay special tax*

Any person who does any act which makes him liable for special tax under subchapter B of Chapter 35 without having paid such tax, shall, besides being liable for the payment of the tax, be fined not less than $1,000 and not more than $5,000.

68A Stat. 732 (1954), 26 U.S.C. § 6011 (1958): *General requirement of return, statement, or list*

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Amendment IV—Searches and Seizures:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amend. V, U.S. Const.: *Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. VI, U.S. Const.: *Jury Trial for Crimes, and Procedural Rights.*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amend. X, U.S. Const.: *Reserved Powers to States.*

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

26 C.F.R. § 44.4412-1 (B)(2): *Registration.*

(2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental," each time an additional employee or agent is engaged to receive wagers. Such

supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see § 44.4905-2.

Rule 3 of Federal Rules of Criminal Procedure:

THE COMPLAINT.

"The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4(a) of Federal Rules of Criminal Procedure:

ISSUANCE. "(a) If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons a warrant shall issue."

Rule 31(c) of the Federal Rules of Criminal Procedure:

"(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

Rule 41. Search and Seizure:

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense;

Statement of the Case

The action was commenced against petitioner by criminal information and he was arrested on October 8, 1964 in a massive raid throughout Bridgeport, Connecticut. On October 8, 1964, a press release which had previously been given to newsmen, announced that approximately forty-five persons engaged in various gambling activities were arrested in a spectacular thrust at the extensive gambling activities in this area, by seventy-five special agents aided by fifty State Policemen. Extensive newspaper, radio and television coverage prevailed in Bridegport and elsewhere in Connecticut. Statements by the Chief Assistant United States Attorney such as the government "had broken the back of gambling" in Bridgeport were reported in the Bridegport Post.

On November 30, 1964 approximately forty-seven gambling cases were assigned for trial at Bridgeport, and four

juries including petitioner's were selected on November 30th and December 1st from the same panel of veniremen. All four cases involved similar substantive charges of gambling tax violations and the same Internal Revenue Agent was the chief government witness in the first three cases. Petitioner's jury was then excused until the trial of Costello, Marchetti, Gjanci and Piccioli was completed, and his trial commenced on January 5, 1965. (A. 5a) Prior to the commencement of trial petitioner filed a motion to suppress evidence, thereafter a hearing was held on December 22, 1964 (A. 2a) and the motion was denied (A. 22a).

The jury returned a verdict of guilty on both counts of the information. Petitioner was sentenced to: Imprisonment for one year on Count 1 and a fine of $10,000. Imposition of sentence was suspended on Count 2 with probation for two years, to start upon date of release from imprisonment. Execution of sentence stayed 24 hours. Petitioner filed motions for judgment of acquittal or new trial and a subsequent motion in arrest of judgment, because of the unconstitutionality of the wagering tax statutes and the prejudicial pre-trial publicity generated by the government. Both motions were denied (A. 5a). On February 9, 1965 petitioner's notice of appeal was filed (A. 6a). The Second Circuit Court of Appeals affirmed the judgment (P.A. 12a) and petitioner's motion for rehearing was denied.

Statement of Facts

Petitioner's conviction was based on the testimony of one John Ripa, a special agent of the Internal Revenue Service. His testimony was to the effect that he had placed a number of bets with one John Mento during the period of August 19, 1964 to September 25, 1964; that he would then observe Mento dial a telephone number, ask for a person named "Joe" and repeat these bets (A. 33a-44a) and that he did not hear a voice at the other end of the line (A. 50a).

Ripa did not ask Mento to call "Joe"; in fact he didn't know who "Joe" was (A. 51a) and did not know the destination of the calls. Nor did any other government witness testify to knowing the "Joe" involved in the alleged conversations.

Mento was never called upon by the government to testify.

On Oct. 8, 1964, special agent Ryan accompanied by other officers arrived at apartment C-6, 2225 Main St., Bridgeport, Conn. After arresting petitioner a search was conducted of the apartment wherein various items were seized including thirteen cancelled telephone bills for 336-0254 in the name Mrs. Peggy Donofrio, 2225 Main St., Bridgeport (Gov't Exs. 5, 13) and fifteen rent receipts for apartment C-6 made out to "F. Scinto." Ryan then questioned petitioner, who denied that he accepted bets and didn't think he had to have a wagering stamp (*infra*, p. 21).

At the time of the arrest, Ryan possessed a "John Doe" search warrant, the affidavits supporting which were filed with the Commissioner on October 1, 1964 (A. 13a) and

a "John Doe" arrest warrant based on a complaint filed with the Commissioner on October 5, 1964 (A. 7a). No facts were stated in the complaint showing that petitioner did not have a wagering tax stamp. The complaint further omitted to state any dates when the affiant or anyone else made the alleged observations of the offense.

Reasons for Granting the Writ

1. Because this Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22 (1953) and *Lewis* v. *United States*, 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax statutes, are in conflict with later decisions of this Court.

2. Although in conflict with decisions of this Court, the Court of Appeals for the Second Circuit has sanctioned the refusal to apply Rule 31(c) Federal Rules of Criminal Procedure in the case at bar.

3. Unless the lower court's decision is reviewed and its apparent conflict with *Giordenello* and other decisions resolved, foreseeable dangers will arise from the decision permitting a Commissioner to determine "probable cause" from sources other than the face of the complaint.

4. This Court understandably hesitates to review questions of evidence, however, when an accused has been convicted by extra-judicial statements without the opportunity to confront and cross-examine his accuser and where the decision of the lower court is in conflict with three decisions of the Seventh Circuit Court of Appeals and a de-

cision of the Fifth Circuit Court of Appeals, justice would best be served by a re-examination of the case.

5. The Court below expressed doubt as to whether the seizure of the telephone bills and rent receipts exceeded the bounds permitted by F.R.Cr.P. 41(b)(2) or the Fourth Amendment, however it followed *Marron* "unless the Court should instruct otherwise" (P.A. 7a)

6. The conscious generation of massive pre-trial publicity by the government combined with the statements of the district court created a situation which only this Court can correct by exercising its power of supervision.

I.

"Are you engaged in the business of accepting wagers on your own account?"

"Do you receive wagers for or on behalf of some other person or persons?"

It is for his failure to answer these and more detailed inquiries contained in Internal Revenue Form 11-C (A. 31a) that petitioner has been subjected to a one year prison sentence and a $10,000.00 fine (A. 6a). As Mr. Justice Black commented in a dissent a decade ago, if a compelled response to these questions

"... would not violate the Fifth Amendment privilege against self-incrimination, it is hard to think of anything that would." *Lewis* v. *United States, supra,* 348 U.S. at 425.

In rejecting petitioner's contention that the self-incrimination clause of the Fifth Amendment protected petitioner, in the wagering tax context, from having to make any statements save those that "cannot possibly have such tendency to incriminate," *Malloy* v. *Hogan*, 378 U.S. 1, 12 (1964), the court below relied squarely upon *Kahriger* and *Lewis*. While noting, by reference, in its opinion on rehearing that *Albertson* v. *Subversive Activities Control Board*, *supra*, may lead this Court to overrule *Kahriger* and *Lewis* "insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination," the court felt that the issue was appropriate only for this Court's determination (P.A. 38).

What petitioner urges is a reappraisal of *Kahriger* and *Lewis* in the light of *Malloy* and *Albertson*.

Significantly, *Kahriger* and *Lewis* were decided without mention of the doctrine this Court firmly established in *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951): that the privilege against self-incrimination "not only extends to answers that would in themselves support a conviction . . . ; but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute . . . ," and without reference to the specific information sought by the Internal Revenue Service form involved here. *Malloy* reemphasized the link-in-the-chain principle ignored in *Kahriger* and *Lewis*; *Albertson* emphasized the questions on the Justice Department registration form, the I.R.S. counterpart of which is involved here and had been ignored in *Kahriger* and *Lewis*.

In *Kahriger* and *Lewis*, the wagering tax statutes were upheld because the Court felt they operated only prospectively and were, therefore, non-compulsory. 345 U.S. at

32, 33; 348 U.S. at 422. But by similar reasoning the *Albertson* registration provisions would have been held valid, since individual Communist Party members could terminate their membership within 30 days after entry of a § 786(a) order directed to the Party, 34 U.S.L. Week at 4014, and thus avoid individual registration. Yet this Court invalidated the registration provisions in *Albertson;* and its comments in so doing are equally applicable to the wagering tax statutes and undermine the rationale of *Kahriger* and *Lewis*:

> "The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act . . . or under § 4(a) of the Subversive Activities Control Act . . . , to mention only two federal criminal statutes. . . . It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause." *Albertson* v. *S.A.C.B., supra,* 34 U.S.L. Week at 4016.

Here, too, the risks of incrimination are obvious. For petitioner to pay the tax required by 26 U.S.C. § 4411, thereby admitting that he was engaged in wagering, he would also be required, by 26 U.S.C. §§ 4412 and 6011, to furnish on I.R.S. Form 11-C the name and address "where each such business is conducted" and the "name and address" of each employee engaged in receiving wagers.[1]

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[1] These questions and the more detailed inquiries are contained on I.R.S. Form 11-C which is *both* a special tax return and appli-

Disclosure in response to these questions, if not an outright admission of violations of some or all of Connecticut's anti-wagering laws, §§ 53-271 to 53-279, 53-295 to 53-297 (Conn. Gen. Stat., 1958 Rev.) or its criminal conspiracy statute, § 54-197 (Conn. Gen. Stat., 1958 Rev.),[2] would constitute at the very least a "link in a chain of evidence sufficient to connect" petitioner with such violations. 378 U.S. at 13.

Certainly the listing of employees and agents is tantamount to an admission that there has been an agreement with these persons to be employees or agents in the business of wagering.[3] And disclosure of the place of business

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cation for registry, which petitioner would have had to complete in order to pay the special tax prescribed by § 4411 and avoid conviction. By virtue of 26 U.S.C. § 6011(a):

> "... Every person required to make a return or statement shall include therein the information required by such forms or regulations."

The Commissioner of Internal Revenue refuses to accept receipt of the $50 for the stamp without the information required by Form 11-C. The fact that a defendant tenders payment which is refused is no defense to a subsequent prosecution for accepting wagers without payment of the $50 special tax. *United States* v. *Mungioli*, 233 F.2d 204, 205 (3 Cir. 1956).

[2] In *Acklen* v. *State of Tennessee*, 267 S.W.2d 101 (Tenn. 1954), for example, the defendant was convicted of conspiracy to violate a state gambling statute solely on the evidence that he had purchased a tax stamp.

[3] 26 C.F.R. § 44.4412-1(b)(2) requires a person engaging or about to engage in the business of receiving wagers to submit the name of any "employee" or "agent" hired to receive wagers *within 10 days after that* "employee" is so engaged. The "employer," then, is forced to supply the name of someone who will admittedly be in a unique position to bear witness against him. And due to the 10 day delay permitted in the registration of such "employees," the information supplied would relate not only to future criminal act, but also to *past* criminal acts.

in which wagering is carried on could lead authorities to a lease, purchase of real estate, or other rental agreement for the purpose of showing overt acts in furtherance of the conspiracy. *State* v. *McLaughlin,* 132 Conn. 325, 340, 44 A.2d 116, 123 (1945). The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, *State* v. *Devine,* 149 Conn. 640, 649, 183 A.2d 612, 616 (1962), and need not be criminal acts in themselves. *United States* v. *Rabinowich,* 238 U.S. 78, 86 (1915).

If response to the questions asked in *Malloy,* 378 U.S. at 13-14, involved the *possibility* of self-incrimination, compelled compliance with the statutes here involved would make self-incrimination under Connecticut law a practical *certainty.*

To leave *Kahriger* and *Lewis* standing in view of the nature of the self-incriminatory responses called for by the statutory scheme involved in the wagering tax laws is to leave clouded with doubt the proud assertion that the Fifth Amendment privilege reflects our "most noble aspirations." *Murphy* v. *Waterfront Commission of New York,* 378 U.S. 52, 55 (1964).

II.

Having determined that 26 U.S.C. Sec. 7262 is a lesser-included offense of 26 U.S.C. Sec. 7203, the Court of Appeals held that petitioner was nevertheless not entitled to the requested charge.

The court below concluded that the issue of willfulness was not "as Sansone itself demonstrates" (P.A. 11a) a "truly disputed one." (P.A. 12a)

The recent case of *Sansone* v. *U.S.*, 380 U.S. 343, 350 (1965), relied upon by the court below, held that "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a *disputed factual element* which is not required for conviction of the lesser-included offense." (Italics ours.)

In deciding that petitioner, who did not take the stand, and whose exculpatory statements were introduced into evidence did not "dispute" willfulness, the court below has set precedent not in accord with the rationale of this Court's decisions in *Sparf, Stevenson* and *Sansone.*

In *Sparf* v. *United States,* 156 U.S. 51 (1895), the phrase does not appear, but this Court held that a jury might convict of the lesser-included offense *"if the evidence permitted them to do so."* (Italics ours.) 156 U.S. at p. 63.

However, in *Sparf* there "... was *an entire absence* of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault." (Italics ours.) 156 U.S. at p. 64.

Not referring to "disputed factual element", this Court in *Stevenson* v. *United States,* 162 U.S. 313 (1896) declared that "if there were *any* evidence which *tended* to show a state of facts . . ." (italics ours) which might bring the crime within the lesser-included offense then it became a proper question for the jury to say whether the evidence was true and whether the crime was the greater or the lesser. 162 U.S. at p. 314.

The case would be the same even though the evidence as to the greater offense might be "uncontradicted" and in the eyes of the court "overwhelming." 162 U.S. at p. 315.

Since *Sansone* referred to *Sparf* and *Stevenson*, it is clear that a factual element is undisputed only when there is a complete absence of evidence bearing on that element.* *Kinard* v. *U.S.*, 96 F.2d 522, 525 (C.A.D.C. 1938).

It is important to note that in *Sansone*, it was *stipulated* that the income reported in the 1957 return was earned and received.

U.S. v. *Sansone*, 334 F.2d 287, 290 (8 Cir. 1964).

Furthermore, "Petitioner *conceded* that the 1957 transaction was reportable and that in not reporting it, he understated his tax liability for that year by $2,456.48." (Italics ours.)

Sansone v. *U.S.*, 380 U.S. 343, 13 L.Ed. at 885.

In view of the stipulation and concession, the court concluded, over dissent however, that no factual dispute existed. In the instant case, however, petitioner did not take the stand and never stipulated or conceded that he acted willfully in failing to register or purchase a tax stamp.

Actually, the converse is true, in that his exculpatory declarations are tantamount to express denials of willfulness, as evidenced by Ryan's testimony:

---

* In *Horning* v. *District of Columbia*, 254 U.S. 135 (1920), cited by the lower court (P.A. 12a) this Court observed that "The external facts are not disputed . . ." 254 U.S. p. 136.

There was no dispute, however, because the defendant took the stand and "*. . . unqualifiedly admitted every charge made against him.*" (Italics ours.)

Horning v. *District of Columbia*, 48 App. D.C. 380, 384, 385. (1919)

"I asked him why he hadn't purchased a wagering stamp, and he said he didn't need one because he doesn't take bets, that he only gambles for a living."

• • • • •

"And I asked him if he was accepting wagers, would he have registered and purchased a Federal wagering stamp, and he said he would have." (P.A. 4a)

If petitioner's declarations were believed by the jury, they might have found him guilty of the lesser offense. His belief that he was not violating Federal law, on its face, negates the necessary "specific evil intent" and "evil motive" which must exist in order to establish willfulness.

United States v. *Murdock*, 290 U.S. 389 (1933);
United States v. *Palermo*, 259 F.2d 872 (3 Cir. 1958);
United States v. *Spies*, 317 U.S. 492 (1943).

The charge of the trial court which is based on the evidence, took this into consideration:

An act or omission is done wilfully—as distinguished from knowingly—if it is done voluntarily and purposely with a *specific intent to do that which the law forbids* or

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voluntarily or purposely to omit to do an act or fulfill an obligation *knowing that such act or obligation is required by law.* (Italics ours.) (A. 67a)

The trial court, apparently alluding to these statements, also regarded them as exculpatory, as evidenced by his charge to the jury. (A. 72a)

• • • • •

"If you find that any exculpatory statements, that is, statements tending to indicate the innocence of the defendant, were made by the defendant, that is, by the accused, to a Government law enforcement official, if later shown to be false those exculpatory statements, if you find there were any, may be considered by you as circumstantial evidence of the defendant's guilty consciousness."

• • • • • •

Likewise, the United States District Attorney, in *United States* v. *Gjanci*, —— F.2d —— (1965), argued to the same lower court that such declarations were exculpatory. (P.A. 27a)

At the trial's conclusion, petitioner submitted nine written requests to charge on this issue. (A. 24a) Request number nine was especially applicable to the evidence in question.

"9. If you find the Defendant believed that he was not required to buy a tax stamp and to register, you must find him not guilty." (A. 26a)

Although petitioner's protestations of innocence may have appeared to the court below to be implausible, unreliable and incredible, it was for the jury alone to appraise such protestations.

Young v. *U.S.*, 309 F.2d 662, 663 (C.A.D.C. 1962).

The jury may have agreed with the trial court and the United States Attorney, that petitioner's statements were expressions of innocence of "willfulness." This, being true, petitioner had the right to have the jury decide whether or not he was guilty of violating Section 7203 or Section 7262, since clearly there was not a *complete absence* of

evidence which might tend to prove petitioner did not act "willfully."

However, by withdrawing consideration of the requested charge from the jury, the trial court, in effect, erroneously directed a verdict against the jury's finding that petitioner violated Section 7262 rather than Section 7203.

Kinard v. *U.S.*, 96 F.2d 522, 525 (C.A.D.C. 1938).

III.

This Court in the landmark case of *Giordenello* v. *United States,* 357 U.S. 480 (1957) held that ". . . in the absence of an indictment, the issue of probable cause had to be determined by the Commissioner *and an adequate basis for such a finding had to appear on the face of the complaint.*" (Italics ours.) 357 U.S. p. 487.

The complaint sets forth the affiant's mere conclusion that "said John Doe, a/k/a "Joe" or "Stash" engaged in the business of accepting wagers without having paid the wagering occupational stamp tax" (A. 7a, 8a).

Not only is the complaint completely barren of any allegations of fact in support of this conclusion, but the affiant did not even allege that he had "reason to believe" said "John Doe" had not paid the Federal Tax.* Furthermore, the complaint is defective in that it omits entirely to state the dates when the affiant or anyone else made the alleged observations of the offense.

Poldo v. *United States,* 55 F. 2d 866, 868 (9 Cir. 1932).

---

* The government's reason for the fatal omission is obvious. The records of registration would certainly not contain the fictitious name of "John Doe, a/k/a Joe" or "Stash." The meaningless allegation that this fictitious name does not appear cannot give probable cause to believe that petitioner had not complied with the law because "John Doe" did not.

Obviously, the Commissioner could not determine from the underlying facts stated on *the face of the complaint,* whether there was probable cause to believe that petitioner had failed to pay the tax, which is the essence of the crime. Therefore, according to the dictates of *Giordenello,* the arrest warrant must fall. See also *United States* v. *Office No. 508 Ricou-Brewster Bldg.,* 119 F. Supp. 24-28 (1954).

Although the court below sustained the warrant using an interpretation of F.R.Cr.P. 4(a) which is in direct conflict with that of *Giordenello,* it is noteworthy that *Giordenello* wasn't cited in the decision which permitted the Commissioner to rely on search warrant affidavits which were not even incorporated into or made a part of the complaint.

The lower court's interpretation of F.R.Cr.P. 4(a) has been advanced in the past and rejected. In *United States* v. *Bosch,* 209 F.Supp. 15 (1962), the Government urged the court to read an affidavit for a search warrant together with a complaint for arrest in order to determine whether the commissioner had sufficient probable cause to justify the issuance of the arrest warrant. The court, quoting *Giordenello* dismissed this contention:

> "In any event such affidavit is not part of the complaint the validity of which must be determined from its face."

United States v. *Bosch* at pp. 20, 21.

Since the use of affidavits to buttress complaints is not alluded to in F.R.Cr.P. 4(a), is not the use of *oral* informa-

tion to supply the missing elements of a complaint, a logical extension of the lower court's reasoning?

The Government proposed such an extension in *United States* v. *Interbartolo*, 192 F.Supp. 587 but the court, citing *Giordenello*, could not agree.

> "The oral information given by Sawtelle to the Commissioner before the warrant of arrest was issued cannot be invoked to buttress the complaint. The Supreme Court has distinctly held that an adequate basis for a finding of probable cause by the Commissioner has to appear on the face of the complaint." 192 F.Supp. at p. 593.

Petitioner's contention is solidified by the proposed amendment in 1964 to F.R.Cr.P. 4(a) by the Advisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The proposed rule would read, " . . . If it appears from the complaint *or from an affidavit filed with the complaint* . . . "

In its explanatory note to the proposed amendment, the Committee clarifies the holding in *Giordenello*.

> "In Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 1503 (1958) it was held that to support the issuance of a warrant the complaint must contain in addition to a statement 'of the essential facts constituting the offense' (Rule 3) a statement of the facts relied upon by the complainant to establish probable cause. *The amendment permits the complainant to state the facts constituting probable cause in a*

separate affidavit in lieu of spelling them out in the complaint." (Italics ours.) 34 FRD 411, 415 (1964).

The Court of Appeals, however, attaches little significance to the Advisory Committee's proposed amendment because it "by no means establishes that the existing Rule would not be construed to permit this." (P.A. 6a)

Extreme doubt is cast upon the validity of that assumption since it seems illogical that the Committee would propose an amendment to a rule, if the existing rule already conformed to the amendment.

More important, however, is the fact that *Giordenello* and other authorities cited by petitioner, have *not* so construed the rule, nor did the court below cite case law in support of its position.

Actually, even the requirements of the proposed amendment were not met since the affidavit was filed four days before the complaint.

The Advisory Committee's proposed amendment to F.R.Cr.P. 5(b) is further support for petitioner's contention. The existing rule states that:

"The Commissioner shall inform the defendant of the complaint *against him* . . ." (Italics ours.)

Whereas, the proposed amendment reads:

"The Commissioner shall inform the defendant of the complaint against him *and of any affidavit filed therewith.* . . ." (Italics ours.)

The Committee's explanatory note is a clear indication that the decision of the court below cannot be reconciled with that of *Giordenello.*

> "The [first] change is designed to insure that under the revision made in Rule 4(a) the defendant arrested on a warrant will receive the same information concerning the basis for the issuance of the warrant *as would previously have been given him by the complaint itself.*" (Italics ours.) 34 F.R.D. 411, 415, 416.

Petitioner contends that until the proposed amendment to F.R.Cr.P. 4(a) is officially accepted, by this court, a deficient arrest complaint cannot be cured by borrowing crucial allegations from search warrant affidavits. This is especially true under the facts of the instant case, where the Commissioner never himself officially indicated what reliance, if any, he placed upon the four day old affidavits.

IV.

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."
>
> *U.S. Constitution, Amendment VI.*

Furthermore, it is settled law that the right of confrontation is the right to the opportunity of cross-examination.

This Court has long held that ". . . a fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."

Kirby v. *United States*, 174 U.S. 47, 55 (1899).

Consequently, petitioner had the constitutional right to confront Mento at the trial and cross-examine him since it is established law that assertions offered testimonially, which have not been in some way subject to the test of cross-examination, are excluded by the Hearsay Rule.

Wigmore on Evidence, Sec. 1362, p. 3.

In the instant case the jury and counsel for petitioner were, in unambiguous terms, sporadically reminded that Mento's declarations were being offered for their truth.

> "The Court: Well, let me ask the Government, in view of the objection by the defendant, is it the Government's claim that this wager, placed by the witness, Mr. Ripa, was placed with the defendant, Stanley Joseph Markis?
>
> Mr. Owens: Yes, your Honor.
>
> • • • • •
>
> The Court: Sometimes it is not possible to encompass all steps if there are more than one step in one question. But the Government has made the representations that you heard. They expect to prove that the wager, placed by the witness, Mr. Ripa, ended up being placed with the defendant, Mr. Markis. (A. 36a)
>
> • • • • •

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But acting consistently with the way I have attempted to from the outset, I will reserve decision on the defendant's motion to strike, and grant leave to the Government forthwith to connect, if it is able to do so, the defendant with these conversations or the placing of these wagers to which Mr. Ripa has testified—absent which connection I of course will strike the testimony" (P.A. 41a).

* * * * *

Faced with these representations by the trial court and assistant district attorney, the jury was obligated to consider these declarations cogent proof that petitioner was in fact "Joe", the anti-phonal speaker, who on each occasion accepted the alleged wagers relayed by Mento.

Washington v. *United States,* 357 U.S. 348 (1957), reversing *per curiam United States* v. *Fred Washington,* 253 F.2d 913 (7 Cir. 1958), "because of insufficiency of the evidence" (three justices dissenting), is apparently dispositive of the issue. Actually there was more evidence in the *Washington* case, to allow the telephone calls into evidence, than exists in the instant case. In *Washington,* the agents eavesdropped on the calling end and listened to the entire conversation.

In the case at bar, Mento didn't testify and Ripa heard none of the alleged conversation emanating from the other end of the line.

Aside from the question of identity it wasn't even established that a two-way conversation had in fact taken place.

The lower court decision also conflicts with at least three decisions of the Seventh Circuit, and a decision in the Fifth Circuit.

In *Morton* v. *United States,* 60 F.2d 696, 698 (7 Cir. 1932) where four agents heard both sides of the conversations and two of the agents testified that they recognized the voice as that of Appellant, the Court held that the testimony of the other agents was admissible because their testimony was received in *corroboration of the substance* of the conversations.

The Court in *Fabacher* v. *United States,* 84 F.2d 602, 604 (5 Cir. 1936) held that where the agent had heard Appellant's voice over the telephone several times, his testimony was competent "• • • in view of his positive identification of Appellant's voice at a later time, even on the date of the trial."

In *Bucur* v. *United States,* 194 F.2d 297, 304 (7 Cir. 1952) it was held that the representation of one party to a telephone conversation that he conversed with another was in itself an insufficient proof of authentication.

In *United States* v. *Glass,* 277 F.2d 566, 569 (7 Cir. 1960) the Court cited *Bucur* v. *United States, supra,* and held that where the witness shared the receiver with one of the speakers, heard both ends of the conversation and recognized Appellant's voice, the witness "was not relying on the mere oral statement made by the party at the other end of the line as to his identity."

A similar fact pattern was presented in *Gubelman* v. *Ands Koch, Inc.,* 234 N.Y. 425, 138 N.E. 81 (1925), where the court decided that since no other witness had testified

to the entire conversation of which the bystander's testimony would be corroborative and no evidence was presented as to what the party sought to be charged said in reply to the calling party, the testimony of the bystander was incompetent.

The court noted that without such initial testimony by a witness who actually heard the entire conversation ". . . we simply have an attempt to bind a person at one end of the line by showing what was said at the other end, without any testimony in respect of the response which was made."

Gubelman v. *Ands Koch, Inc.*, p. 429.

It comes too late to now say, as does the court below, that Mento's unsworn, extra-judicial assertions were not offered for their truth. (P.A. 4a) Petitioner was tried and convicted by a jury that was not only affirmatively led to believe the contrary but was never instructed otherwise.

It is further submitted that the exception to the Hearsay Rule, referred to by the court below (P.A. 5a), is not applicable to the facts of the case, nor has it been traditionally accepted by our courts. *McCormick, Evidence,* Sec. 273 (1954).

Mento, the declarant, was not "perceiving" an "external event" which he was "narrating" to Ripa since he alone dialed 336-0524 and merely spoke into the telephone. Accordingly, Ripa's presence at the time of the utterances is meaningless. He didn't know whose number was dialed, what, if anything, was said at the other end of the line nor who might have said it and consequently, did not "perceive" petitioner accepting wagers.

See: *McCormick, Evidence,* Sec. 273 (1954).

The observation of the court below that, "It is plain that Ripa could not be allowed to testify as to what Mento said the receiver said; Mento alone could do that" (P.A. 4a), is the correct law of the case and states petitioners' position perfectly.

For all practical purposes, Mento was by implication, "saying what the receiver said" to Ripa who so testified on the stand.

The truth of these utterances depended solely on the credit of Mento, thereby emphasizing the need for confrontation and cross-examination and rendering the exception inapplicable. Furthermore, Mento was an unusually available witness to the government, but not produced in court, and under the facts of the case, there is no reason to assume his testimony to be reliable, or trustworthy, the very reasons for the existence of the exception.

See: *Morgan, A Suggested Classification of Utterances Admissible as Res Gestae,* 31 Yale L.J. 229, 236, 237 (1922).

V.

Although the court below indicated some doubt as to whether telephone bills, and rent receipts are "instrumentalities and means by which" the crime here charged was being committed, it upheld, however, the seizure of these items as not being violative of F.R.Cr.P. 41(b)(2), or the Fourth Amendment, on the basis of *Marron* v. *United States,* 275 U.S. 192, 199 (1927), "unless the Court should instruct otherwise." (P.A. 7a)

—

It is submitted that *Marron* was decided on the basis that the premises in question were being operated as a nuisance, the maintenance of which was punishable under the National Prohibition Act. The court thus concluded that the officers could seize the items used in operating the establishment. Actually, *Marron* is not as foreign to petitioner's position as the Court below intimated since this Court held that the ledgers and bills were *not* authorized by the search warrant, 275 U.S. p. 198, and the Court below has not justified the seizure in the instant case as being an incident to a lawful arrest, as in *Marron*.

The rationale of *Marron*, therefore, cannot encompass the facts of the instant case and doesn't call for a determination that such items as rent receipts and telephone bills are instrumentalities of the crime of accepting wagers without a tax stamp.

This Court has apparently been reluctant to give *Marron* its full force and effect, rather, its general rule has been sparingly applied and exceptions to it more frequently made.

see *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931);
United States v. *Lefkowitz*, 285 U. S. 452.

As Chief Judge Sobeloff points out in his vigorous dissent in *United States* v. *Boyette*, 299 F. 2d 92, 97 (1962), "In light of these two later cases, it is apparent that *Marron* has been severely damaged if not destroyed, as authority for a general rule that would treat records as instrumentalities of crime." The Chief Judge cites with approval, however, *Gouled* v. *United States*, 255 U. S. 298 (1921) which

seems to set a reasonable and workable distinction between the legitimate use of a search warrant and the use which violates a citizen's rights under the Fourth and Fifth Amendments.

Search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making a search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken." 255 U. S. p. 309.

Viewed in the light of *Gouled, Go-Bart Importing Co.*, and *Lefkowitz*, it cannot be seriously disputed that the evidence in question was seized solely as evidence to be used against petitioner and for no other constitutionally sanctioned purpose.

Agent Ryan's admission that he found the telephone bills "on top of the dresser *among other personal effects*" (italics ours) (R. 301), is graphic evidence that the seizure violated petitioner's rights under the Fourth and Fifth Amendments.

Petitioner therefore, urges this Court, if *Marron* can be interpreted as holding to the contrary, to reconsider the case in view of the foregoing decisions of this Court.

Furthermore, the admission of these items into evidence was not harmless error. The government had to prove that

the telephone and apartment belonged to petitioner. It sought to do so by convincing the jury that the names on the bills and receipts were fictitious and that petitioner listed the telephone and apartment in these names so that he could conceal his alleged gambling operation, a fact from which willfullness could be inferred.* Agent Ryan testified that the phone bills were found among petitioner's personal effects and he questioned petitioner about the names on the papers and a telephone company employee witness for the government testified that 336-0254 at Apt. C-6 was listed to a Peggy Donofrio (R. 151). All these circumstances bearing on crucial issues must have been given some consideration by the jury.

Obviously, the government considered the fact that the telephone was listed in the name of Peggy Donofrio and that no person by that name lived at Apt. C-6, extremely important since this allegation is made to support probable cause *in both the search warrant affidavit and the complaint for arrest* (A. 7a, 13a).

The test to be applied as to whether the admission of unconstitutionally seized evidence is prejudicial error has been recently set forth by this Court.

> "The question is whether there is a reasonable *possibility* that the evidence complained of *might* have contributed to the conviction." (Italics ours.)
>
> *Fahy* v. *Conn.*, 375 U. S. 85, 86, 87 (1963).

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* The lower court's reason for finding the rent receipts "particularly insignificant" (P.A. 7a, footnote 3) is unclear since the secretary testified on direct examination that "many times people pay other people's rent" and the receipts are made out "to the person the apartment is listed under" (R. 152) and later on cross-examination, that she did not know for a fact whether petitioner lived at apartment C-6 (R. 155).

That it was not harmless error to admit this evidence is illustrated by the conclusion of the Court in *State* v. *Miller*, 152 C. 343, 349 (1965):

> "Where a conviction depends upon the unanimous vote of twelve members of the jury, it would be a rare case where an appellate court could say that there was no reasonable possibility that a given piece of evidence did not contribute to the finding of guilty."

VI.

The conscious generation of publicity surrounding the events of October 8 is particularly significant because it demonstrates that the government was controlling conduct which the Constitution left to the responsibility of the states.

Although *Kahriger* upheld the constitutionality of these statutes as revenue measures, the Court was not confronted with vivid evidence, as appears in the instant case, of the use of the statutes by the government and by the trial court as merely an assault on gambling in Connecticut.

In *United States* v. *Calamaro*, 354 U.S. 351, 358 (1957) this Court noted that, "The statute was passed and its constitutionality was upheld, as a revenue measure, and apart from all else in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt."

Compared in the light of the foregoing is the remark of the trial court made prior to imposition of sentence upon Costello, Marchetti, Gjanci and Piccioli on January 11, 1965.

> "While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling" (P.A. 33a).

Again, immediately prior to imposing the maximum sentence and fine permissible under Count I upon petitioner the trial court commented at great length, (R. 406-422) (P.A. 34a) about "what has been accomplished by this latest federal crackdown upon gambling and organized crime".

It was Justice Frankfurter's opinion that these statutes were actually "verbal cellophane" which permitted Congress to "control conduct which the Constitution left to the responsibility of the states". 345 U.S. p. 38.

Petitioner submits that this "verbal cellophane" has been stripped away in the instant case by the fashion in which the statutes were enforced by the government and by the trial court's statements "in the prosecutorial area beyond his function." (P.A. 35a)

Practically every phase of the mass arrests was calculated by the government to and did produce publicity which saturated the state of Connecticut, which the Court below characterized as "needless intensification" (P.A. 39a).

While it is true, that no motions directed at publicity were made in the instant case until after verdict, it should be mentioned that petitioner's trial was the fourth in a series of trials resulting from the raid of October 8, and that his jury, selected on December 1 did not hear his case until January 5, 1965, after the Marchetti, Gjanci, Costello

and Piccioli trials were completed. (A. 3a) Prior to the commencement of the first trial, counsel for Grassia, *United States* v. *Grassia*, —— F. 2d —— (1965) made the trial court keenly aware of the prejudicial pre-trial publicity which had been generated by the government, (P.A. 37a) in his motion for dismissal of the indictment or a continuance. Subsequently, before Costello's trial began, his counsel moved for a mistrial because of prejudicial newspaper publicity, which motion was denied (P.A. 21a) and on December 15 Piccioli's motion for a new jury or a continuance was likewise denied. (P.A. 30a)

When the instant case was reached for trial before the same trial court, counsel for petitioner did not reiterate or pursue these motions, in view of the fact that the court had turned deaf ears to those previously made. Petitioner submits that denial of such motions, if made by petitioner, was virtually a certainty. In a realistic sense, there is no reason to suppose that petitioner would have succeeded where others had failed and under the unusual circumstances surrounding these trials the formality of making the motions might be deemed to have been unnecessary. See *U. S.* v. *Viale*, 312 F. 2d 595, 601 (2 Cir. 1963).

Petitioner accordingly submits that his conviction should be reversed on the basis that the statutes here involved, have been enforced both prosecutorily and judicially so as to control conduct which the Constitution has left to the States in violation of the Tenth Amendment, or since there is every indication that the government was the sole producing agent of the prejudicial publicity, on the basis of this Court's exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law," *Marshall* v. *United States*, 360 U.S. 310, 313 (1959).

CONCLUSION

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

CHARLES HANKEN
PHILIP BAROFF
240 Fairfield Avenue
Bridgeport, Connecticut

ALFRED BELINKIE
1016 Broad Street
Bridgeport, Connecticut

Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 43

STANLEY MARKIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR PETITIONER STANLEY MARKIS

CHARLES HANKEN
PHILIP BAROFF
240 Fairfield Avenue
Bridgeport, Connecticut

ALFRED BELINKIE
1016 Broad Street
Bridgeport, Connecticut

Counsel for Petitioner

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 514—September Term, 1964.

(Argued June 8, 1965 Decided October 29, 1965.)

Docket No. 29585

UNITED STATES OF AMERICA,

Appellee,

—v.—

STANLEY JOSEPH MARKIS,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for Connecticut, William H. Timbers, *Chief Judge,* convicting appellant, after a verdict, on a two-count information charging violation of 26 U. S. C. §7203 by wilful failure to pay the special gambling occupational tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412. Affirmed.

CHARLES HANKEN, Bridgeport, Conn. (Philip Baroff, on brief), *for Appellant.*

HOWARD R. MOSKOF, Assistant United States Attorney (Jon O. Newman, United States Attorney), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Markis appeals from a judgment of the District Court for Connecticut convicting him, after trial before Chief Judge Timbers and a jury, on a two-count information under 26 U. S. C. §7203 of wilful failure to pay the special occupational gambling tax provided in §4411 and to register as required in §4412. He was sentenced to imprisonment for one year and a $10,000 fine on the first count and to two years probation on the second. His arguments as to the unconstitutionality of the statutes are dealt with in *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965). Although he now presses the claim of unfair publicity, he requested trial at Bridgeport, and made no motion for a change of venue or a continuance. No juror selected to try him had read of his arrest, none of the publicity concerning the trials preceding his had referred to him, and he made no motion relating to publicity until after verdict. Apart from all else, this came too late, *United States* v. *Costello*, *supra*.

Special Agent Ripa of the I. R. S. testified that on many occasions in August and September, 1964, he placed bets with John Mento in the latter's service station, observed Mento dial telephone number 336-0254, and heard him speak with a man whom, on almost all occasions, he asked for or addressed as "'Joe," and repeat the wagers. Records of the telephone company showed that number 336-0254 was located in apartment C-6, 2225 Main Street, Bridgeport. It was a number in the name of Mrs. Peggy Donofrio; no one by that name could be identified. Markis had long occupied the apartment, which was listed in the name of F. Scinto, also unknown, and frequently paid the rent. He was observed entering and leaving the apartment in the period

when the bets were being placed. About July 27 he was introduced to Ripa by the nickname "Stash."

On affidavits of agents reciting the substance of the above and further details, including Markis' failure to purchase an occupational tax stamp, a United States Commissioner, on October 1, 1964, issued a warrant commanding a search of the apartment for and seizure of "certain records, papers, writings, slips, books, newspapers primarily reporting results and information of horse races and other sporting activity, markings, writing materials, racing forms, cash monies, machines and equipment" being used in violation of the gambling tax laws. On October 5, 1964, the agent who had made the principal affidavit swore before the same Commissioner to a complaint which alleged "'That on or about October 8, 1964," John Doe, also known as Joe or Stash, engaged in the business of accepting wagers without payment of the Occupational Stamp Tax; the complaint contained the substance of what had been set forth in the search warrant affidavits although in more abbreviated form and without the statement that a search of the records had revealed no purchase of a stamp by Markis. On the same day the Commissioner issued a warrant of arrest.

The search and arrest warrants were executed by Special Agent Ryan, accompanied by other officers, on October 8 about 1:15 P.M. After knocking and making proper announcement, Ryan heard movement inside but the door was not opened. An attempt to force entry with a sledge hammer failed, the door having been barricaded. Shortly thereafter the officers heard the barricade being removed, and the door was opened by Markis, wearing pajama bottoms and one wet slipper; he identified himself, stating his name and acknowledging he was known as "Stash" or "Joe." Ryan gave Markis both warrants to read. He found

a quantity of paraphernalia useful for the conduct of a gambling business, the telephone, bearing number 336-0254, torn out of the wall and with the amplifier separated from the receiver, and, in the bathroom, the mate to the wet slipper. The telephone having been repaired, unknown voices called and sought to place bets with "Stash" or "Joe." Flushing of the toilet trap with the aid of a plumber yielded slips of paper which were identified as notations by gamblers to record bets. While still in the apartment, Ryan interviewed Markis, after explaining "that he had the rights under the Fifth Amendment against self-incrimination, and that he didn't have to answer any questions that I asked him." Ryan testified, without objection:

> "I asked him why he hadn't purchased a wagering stamp, and he said he didn't need one because he doesn't take bets, that he only gambles for a living.
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> • • • • •
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> "And I asked him if he was accepting wagers, would he have registered and purchased a Federal wagering stamp, and he said he would have."

(1) Markis claims it was error to admit Ripa's testimony as to Mento's placing of bets by telephone in the absence of identification of Markis' voice as that on the receiving end. It is plain that Ripa could not be allowed to testify as to what Mento said the receiver said; Mento alone could do that. See *Van Riper* v. *United States*, 13 F. 2d 961, 968 (2 Cir.), cert. denied, 273 U. S. 702 (1926); *United States* v. *Benjamin*, 328 F. 2d 854, 861 (2 Cir.), cert. denied, 377 U. S. 953 (1964). But Mento's dialing of 336-0254 and his placing of bets, including language used in doing so, were not declarations introduced for their truth, and the hearsay rule thus has no application to Ripa's testimony re-

lating to these events. See *United States* v. *Press*, 336 F. 2d 1003, 1011-12 (2 Cir.), cert. denied, 379 U. S. 965 (1964); *United States* v. *Ross*, 321 F. 2d 61, 68-69 (2 Cir.), cert. denied, 375 U. S. 894 (1963); McCormick, Evidence §§225, 228 (1954). If Mento's remarks addressing the unseen listener as "Joe" were to be regarded as hearsay on the basis, perhaps over-nice, that they amounted to declarations by Mento that he was talking to someone who acknowledged or whose voice confirmed being "Joe," the statements would come within the hearsay exception for utterances made simultaneously with the event being perceived—an exception normally classified under *res gestae*, McCormick, *supra*, §273; Uniform Rule of Evidence 63(4). It is true that, standing alone, all this testimony, even though not banned by the hearsay rule, would be objectionable as irrelevant. But that deficiency was removed by the evidence that the telephone bearing the number 336-0254 was in the apartment Markis occupied and his admission to Agent Ryan that he was known as "Joe."[1] This factual chain afforded competent circumstantial evidence that Markis was indeed the man with whom Mento was placing bets.

(2) Markis contends that the search warrant was invalidly issued, that the search and seizure went beyond "the means of committing" the offense, F. R. Cr. P. 41(b)(2), and that the arrest warrant was invalid so that all fruits of the arrest must be excluded.[2]

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1 Since Markis did not urge, here or in the district court, that receipt of his admission to Agent Ryan violated the extrapolation of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), which is currently mooted, we need not deal with that question.

2 In view of the amendment of 26 U. S. C. §7608 by 76 Stat. 1143 (1962), the question which concerned us in *United States* v. *Viale*, 312 F. 2d 595, 599-600 (2 Cir.), cert. denied, 373 U. S. 903 (1963), no longer arises.

The search warrant was valid under the criteria stated in the Supreme Court's most recent decision on the subject, *United States* v. *Ventresca*, 380 U. S. 102 (1965). The attack on the arrest warrant based on the point that, in obvious error, the complaint alleged Markis had committed the offense three days in the future requires no discussion. Cf. *United States* v. *Zambito*, 315 F. 2d 266, 269 (4 Cir.), cert. denied, 373 U. S. 924 (1963). We find no other sufficient basis for holding the arrest warrant defective. A complaint, like affidavits supporting a search warrant, must be read "in a commonsense and realistic fashion." *United States* v. *Ventresca, supra*, 380 U. S. at 108. Furthermore, despite the statement in F. R. Cr. P. 4, "If it appears from the complaint that there is probable cause to believe," we are by no means convinced that the Rules meant to prohibit a Commissioner from relying on affidavits, relating to the same person and the same offense, which he had considered in issuing a search warrant only four days before; the fact that the Advisory Committee on the Criminal Rules has recommended an amendment expressly permitting the necessary showing for an arrest warrant to be made by affidavits, 31 F. R. D. 665, 670; 34 F. R. D. 411, 415, by no means establishes that the existing Rule would not be construed to permit this.

The remaining issue under this heading is the scope of the search and seizure. Although the objects seized were within the description of the warrant, that would not be determinative if its reach exceeded the bounds permitted by F. R. Cr. P. 41(b)(2) or the Fourth Amendment. We entertain no doubt that sporting newspapers, slips on which bets were being recorded, pens for recording bets, the calendar for checking races, and the much abused telephone were "instrumentalities and means by which" the crime

here charged—the conduct of a wagering business without payment of the tax or registration—was being committed. *Harris* v. *United States*, 331 U. S. 145, 154 (1947). See *Rutherford* v. *United States*, 264 F. 2d 180 (9 Cir.), cert. denied, 359 U. S. 1003 (1959); *United States* v. *Shaffer*, 291 F. 2d 689 (7 Cir.), cert. denied, 368 U. S. 915 (1961). The issue is thus narrowed to the bills for rent and for telephone service. To support their seizure the Government invokes *Marron* v. *United States*, 275 U. S. 192, 199 (1927), where the Court sanctioned the seizure of utility bills of an enterprise conducted in violation of the National Prohibition Act. Appellant claims the authority of *Marron* to have been undermined by later decisions, as argued in Chief Judge Sobeloff's dissenting opinion in *United States* v. *Boyette*, 299 F. 2d 92, 97-98 (4 Cir.), cert. denied, 369 U. S. 844 (1962). We are not persuaded of this and would follow *Marron* unless the Court should instruct otherwise. But even if we should be wrong in this, we would hold that receipt of these items in evidence would have been harmless error, 28 U. S. C. §2111, F. R. Cr. P. 52(a).[3]

(3) Markis' most impressive argument for reversal is that the judge erred in refusing to give a requested instruction that the jury might convict of a lesser included offense. Consideration of this requires a statement of the pertinent statutes.

Chapter 75 of the Internal Revenue Code creates a hierarchy of sanctions under the revenue laws. Section 7201, "the capstone," *Spies* v. *United States*, 317 U. S. 492, 497

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3 Since both the rent receipts and the telephone bills were made out in names other than that of the defendant, it is difficult to see what they added to the Government's case. The rent receipts were particularly insignificant, since the secretary to the apartment building manager testified that Markis often paid the rent of apartment 6-C to her.

(1943), provides that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof" shall be guilty of a felony, subject to a maximum fine of $10,000 and maximum imprisonment of five years. Next in rank stands §7203 under which Markis was prosecuted; this says that "any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . or supply any information" who wilfully fails to comply is guilty of a misdemeanor, again with a maximum fine of $10,000 but with imprisonment limited to a year. Passing over other offenses not here relevant, we come to §7262, which provides that any person who does any act that makes him liable to the special occupational tax on gambling "without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000." Finally, with an exception not here relevant, §7272(a) directs that "any person . . . who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50."

Among Markis' written requests for instructions was the following:

> "If you find that the Defendant was required under the Statute to register and pay the tax but that he did not wilfully, as I described the word wilfully to you, fail to pay such tax or wilfully fail to so register but that he merely did not pay the tax or register, then you may find him guilty of the lesser included offense set forth in 26 U. S. C. 7262.
>
> Rule 31(c) Federal Rules of Criminal Procedure."

Chief Judge Timbers declined to give this as "incomprehensible to the Court," due exception was taken, and although the requested charge may have been too broad, see note 6 *infra*, we regard the point as sufficiently raised.

F. R. Cr. P. 31(c), referred to in the request, provides that a defendant "may" be convicted of any "offense necessarily included in the offense" charged. Despite the fact that the primary purpose of the Act of June 1, 1872, §9, 17 Stat. 198, carried forward by this Rule, was to aid the prosecution when its proof did not fully live up to expectation, it is a long settled principle that, in appropriate cases, it may also be availed of by the defense, *Stevenson* v. *United States*, 162 U. S. 313 (1896)—although the Supreme Court has rarely found cases suitable for its application. See *Berra* v. *United States*, 351 U. S. 131 (1956); *Sansone* v. *United States*, 380 U. S. 343 (1965).

In its latest pronouncement the Court has defined the rule as applicable when "the lesser offense is included within but not, on the facts of the case, . . . completely encompassed by the greater." *Sansone* v. *United States, supra*, 380 U. S. at 350. So far as concerns Markis' failure to pay the tax, the case thus turns in the first instance on whether 26 U. S. C. §7262 is a circle included within §7203 or is congruent therewith.

There is no dispute that both sections require proof (1) that Markis was accepting wagers or receiving them on behalf of someone engaged in the business and (2) that he failed to pay the $50 tax. The question is whether §7262 requires the proof of wilfulness, or of the same kind of wilfulness, that §7203 demands. The answer becomes clear when we look at the gambling tax statute as enacted in 1951 and embodied as chapter 27A of the Internal Revenue

Code of 1939. The penalty provision respecting the occupational tax, §3294, reads as follows:

> "§3294. Penalties.
>
> (a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.
>
> (b) Failure to post or exhibit stamp. Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.
>
> (c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter."

The cross-reference in paragraph (c) in effect made applicable the felony and misdemeanor penalties for wilful misconduct now contained in §§7201-03. It is thus patent that wilfulness was not an essential element of the offenses described in paragraph (a), the predecessor of §7262 of the 1954 Code,[4] and the reports with respect to the 1954 legislation indicate that the rearrangement was not intended to work a substantive change.[5] See, accord, *United States* v.

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4 See the classical discussion by Mr. Justice Jackson in *Morissette* v. *United States*, 342 U. S. 246, 250-62 (1952).

5 See 3 U. S. Code, Cong. & Ad. News 4577, 5257 (1954).

Kahriger, 210 F. 2d 565, 571 (3 Cir. 1954); *Burks* v. *United States*, 287 F. 2d 117, 125 (9 Cir. 1961), cert. denied, 369 U. S. 841 (1962); compare *United States* v. *Shaffer*, *supra*, 291 F. 2d at 693. Subsequent to the argument before us, the Solicitor General conceded, in a memorandum filed with the Supreme Court on defendant's petition for certiorari to review *United States* v. *Altiere*, 343 F. 2d 115 (7 Cir. 1965), that §7262 does not require proof of wilfulness, and the Government has withdrawn its contrary contention here.[6]

It argues, however, that even on this basis refusal of the instruction was not error since, as said in *Sansone*, "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a *disputed* factual element which is not required for conviction of the lesser-included offense," 380 U. S. at 350 (emphasis supplied), and, as it urges, Markis' wilfulness was not really in dispute. The Government does not, of course, deny that the issue of wilfulness was disputed in the sense that it had to be submitted to the jury since, absent a concession, there can never be a directed verdict for the prosecution on any issue in a criminal case. Its argument is rather that, as *Sansone* itself demonstrates, something more than that is required to create "a disputed factual element" in the sense of that opinion, and that, in view of Agent Ryan's unimpeached testimony as to Markis' admission shortly after arrest,[7] that extra something did not exist here.

If the testimony had come from Markis' lips, we would be quite sure the Government was right. For then Markis

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6 The Solicitor General's concession went only to §7262 and reserved the question whether §7272 states an offense or merely a civil penalty. Our opinion is similarly limited.

7 For reasons indicated in note 1, the admissibility of Markis' admission need not be considered.

would have admitted knowing that conducting a wagering business or receiving wagers required payment of a tax, the jury must have found he was doing exactly that, and there was nothing to suggest that the activity proved against him was so close to the line that he might reasonably have thought the law inapplicable to it. We reach the same result although the testimony was of an extrajudicial statement allegedly made by Markis when, as here, the making of the statement was not attacked or contradicted. The mere fact that the jury was still free to disbelieve this portion of the agent's testimony does not elevate the issue to a truly "disputed" one; in the language of the Model Penal Code §1.07(5) (1962), it does not provide "a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Model Penal Code §1.08 comment, at 42-43 (Tent. Draft, No. 5, 1956). This hits the essential point. The lesser-included offense charge is not required simply because the jury could exercise its power of acquitting on the greater charge for no reason at all "in the teeth of both law and facts," *Horning* v. *District of Columbia*, 254 U. S. 135, 138 (1920); there must be a rational basis for its doing so. Precisely this, we think is the distinction between *Sparf* v. *United States*, 156 U. S. 51, 63-64 (1895), and *Stevenson* v. *United States*, *supra*, 162 U. S. at 315, 322-23, both cited by the Court with apparent approval in the recent cases of *Berra* and *Sansone*.

Appellant's other points do not require discussion.

Affirmed.

Opinion of Court of Appeals in *U. S.* v. *Costello, Marchetti and Gjanci*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 481/2/3/4—September Term, 1964.

(Argued June 8,.1965 Decided October 29, 1965.)

Docket Nos. 29524/5/6/7

UNITED STATES OF AMERICA,

Appellee;

—v.—

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI and ARTHUR GJANCI,

Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COSTELLO,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES "TOTTO" MARCHETTI,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTHUR GJANCI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeals from judgments of the District Court for Connecticut, William H. Timbers, *Chief Judge*, convicting appellants, after a verdict, of offenses under the federal wagering tax laws. Affirmed.

PHILIP R. SHIFF, New Haven, Conn. (Adrian W. Maher, on brief), *for Appellant Frank Costello.*

JACOB D. ZELDES, Bridgeport, Conn. (Francis J. King, David Goldstein, Joseph S. Catalano, on brief), *for Appellant Marchetti.*

CARROLL W. BREWSTER (Gumbart, Corbin, Tyler & Cooper, New Haven, Conn.) Kimberly B. Cheney, on brief), *for Appellant Gjanci.*

JON O. NEWMAN, United States Attorney (Howard R. Moskof, Assistant United States Attorney, on brief), *for Appellee.*

FRIENDLY, *Circuit Judge*:

These three appeals, along with *United States* v. *Piccioli*, —— F. 2d ——, and *United States* v. *Markis*, —— F. 2d ——, this day decided, stem from a raid carried out by Internal Revenue Service agents and state police in Bridgeport, Connecticut, on October 8, 1964. Appellants Frank Costello, James "Totto" Marchetti and Arthur Gjanci were tried together and convicted on all counts before Chief Judge Timbers and a jury under four indictments. Three two-count indictments similar in form charged each of them with violations of 26 U. S. C. §7203 in that, being engaged in the business of accepting wagers or receiving them for one so engaged, they wilfully failed (1) to purchase the occupational wagering tax stamp required by 26 U. S. C. §4411 and (2) to register as required by §4412. The fourth indictment charged all three with conspiring to fail to purchase the occupational tax stamps. Costello and Marchetti received concurrent one-year prison sentences and $10,000 fines in the conspiracy case and under Count 1 of their individual indictments; the imposition of sentence was suspended and probation for two years was imposed under Count 2. Gjanci's sentences differed in that the fine was $2,500.

Certain points are common to the three appeals and, to some extent, to the two others mentioned. After outlining the facts of this case, we shall deal first with these common points and then consider arguments peculiar to various appellants.

In the summer of 1964 Special Agent John Ripa of the I. R. S. was detailed to work in Bridgeport as an undercover agent, posing as a person wishing to make numbers and horse bets and later as a would-be bookmaker. He placed numerous bets with Gjanci and Marchetti at the

Lafayette Diner or, in some instances with respect to Gjanci, at the Greek Coffee House. On October 2, he placed bets with Costello, paying with two marked $20 bills which were found in Costello's pocket on the latter's arrest. Earlier, on September 3, he had asked Gjanci if he could set up an arrangement to turn in bets and receive a commission. Gjanci said he would speak to Marchetti to arrange this, and also that he would talk to his "bosses—Totto and Frank" about letting Ripa place bets at a local variety store; Gjanci referred to Costello as the "big boss of Bridgeport." On September 9, Marchetti arranged for Ripa to "book on 50%" with "Tony," with settlement to be made with Marchetti. On several later instances Costello made inquiries and gave directions whence the jury could infer that he was indeed "a boss"—if not indeed "the boss," in the enterprise. At trial Costello denied any involvement in the wagering business; Marchetti admitted accepting some bets from Ripa but denied others and also denied Costello's involvement; Gjanci did not testify.

I.

Appellants' most basic point concerns the constitutionality of the federal wagering tax. Recognizing that these provisions were sustained in *United States* v. *Kahriger*, 345 U. S. 22 (1953), appellants say their situation differs in two respects. One is that statements of the prosecutor and the judge demonstrated that the purpose of the Government's applying the statute against them was not to collect revenue, concededly the only available source of federal power, but to promote the enforcement of state laws against gambling; the other is that the enlargement of the self-incrimination clause of the Fifth Amendment to include federal compulsion of the admission of crime

against the states, see *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 53 n. 1, 77-78 (1964), overruling *United States* v. *Murdock*, 284 U. S. 141 (1931), and recent emphasis that the clause embraces all statements save those that "cannot possibly" tend to incriminate, see *Malloy* v. *Hogan*, 378 U. S. 1, 12 (1964), place the *Kahriger* holding on self-incrimination in question.[1]

With respect to the first contention, apart from questions as to what effect on constitutionality statements by prosecutors and judges can have, nothing in the present record goes materially beyond what the Supreme Court characterized in *Kahriger* as "suggestions in the debates that Congress sought to hinder, if not prevent, the type of gambling taxed." 345 U. S. at 27 n. 3. If "the verbal cellophane of a revenue measure," 345 U. S. at 38 (dissenting opinion of Mr. Justice Frankfurter), was sufficiently opaque for a majority of the Supreme Court twelve years ago, it remains so for us now. Whether the judge impermissibly allowed considerations unrelated to the nonpayment of the tax to enter into sentence, a claim raised only

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1 Marchetti makes an additional argument based on the 1958 amendment, 72 Stat. 1304, which added to §4401(c) a provision that any person required to register under §4412 who receives wagers for or on behalf of another without having registered the name and residence of the latter as §4412(a)(3) requires, shall himself be liable for the tax on wagers to the extent of his receipts. He contends that since §4412 requires registration by persons required to pay the special tax by §4411 and §4411 requires such payment from anyone who is liable for the percentage tax under §4401 or is engaged in receiving wagers for or on behalf of a person so liable, a cross-reference to §4412 in §4401 necessarily renders the statute circular and unintelligible. We see no force in this argument. The 1958 amendment did not affect who was required to pay the special tax and to register, see 3 U. S. Code Cong. & Ad. News 4457 (1958); it simply made persons who failed to comply with the special requirement of §4412(a)(3) liable for the tax on wagers imposed by §4401, when they would not previously have been.

by Piccioli, is a different problem which we will discuss in the opinion in his case.

The contention with respect to the self-incrimination clause would be more serious if *United States* v. *Kahriger* stood alone, since whatever the stated basis for decision, the result followed so logically from the now-overruled *Murdock* doctrine. However, the Court again considered the Fifth Amendment objection in *Lewis* v. *United States*, 348 U. S. 419 (1955), which arose in the District of Columbia where wagering was a crime by federal law. The Court disposed of the argument on the basis that "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment." 348 U. S. at 422. If Congress can constitutionally require, as a condition to gambling, a registration that would show an intention to engage in a business prohibited by a federal law, we can think of no reason why it should not have the same power to require registration that would give notice of an intention to engage in activity made illegal by the laws of a state; and the probability of incrimination for future or even past acts, however great, is irrelevant on the Court's stated theory that the registration cannot be called compulsory. It is true that both *Kahriger* and *Lewis* were decided over vigorous dissents by Justices Black and Douglas on the Fifth Amendment point. But we find no subsequent opinion reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow. Cf. *United States* v. *Zizzo*, 338 F. 2d

577, 580-81 (7 Cir. 1964), cert. denied, —— U. S. —— (1965); *United States* v. *Cefalu*, 338 F. 2d 582 (7 Cir. 1964). We are therefore not required to consider other arguments on which the Government might rely, such as the lack of any claim of the privilege at an earlier stage, see *United States* v. *Sullivan*, 274 U. S. 259, 263-64 (1927); *United States* v. *Kahriger, supra*, 345 U. S. at 32, and the required records doctrine, see *Shapiro* v. *United States*, 335 U. S. 1 (1948); Meltzer, Required Records, the McCarran Act and the Privilege against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).

II.

Appellants contend their trial was rendered unfair by publicity, much of it emanating from the Government.

The indictments against appellants and others were returned in New Haven on October 6, 1964; bail was fixed but the indictments remained impounded, F. R. Cr. P. 6(e), until October 8 at 2:36 P.M. A press release distributed earlier by the Government to newsmen announced in part that at 1:20 P.M.: "In a spectacular thrust at the extensive gambling activities in this area, 75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments, arresting approximately 45 persons engaged in such gambling activities as policy numbers and betting on horse races and other sports events, in violation of the Federal wagering tax laws. . . . The special agents were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate." The release mentioned no names except for saying that appellants were charged with conspiracy, as well as with the two substantive counts employed against most other defendants, and

that Costello, Marchetti and a third man had bail fixed at $10,000, $5,000 and $5,000, respectively, while the figure for the other defendants was $2,500. The Government took the newsmen to the I. R. S. headquarters where the latter were able to photograph those who had been arrested as they were brought into custody. There was extensive newspaper, radio and television coverage on October 8 in Bridgeport and elsewhere in Connecticut. On the two following days, the Bridgeport press reported oral statements by Chief Assistant United States Attorney Owens to the effect that the Government had "broken the back of gambling" in Bridgeport, that funds from gambling were supporting prostitution, that housewives had called to express gratitude at the prospective curtailment of their husbands' aleatory propensities, and that Costello and Marchetti had previous convictions for income tax violation.

The last statement was improper by any standard and might well be a basis for reversal if appellants had moved for a change of venue or a continuance and this had been denied, and examination of the jurors had revealed recollection of these charges. *Marshall* v. *United States*, 360 U. S. 310 (1959); *United States ex rel. Brown* v. *Smith*, 306 F. 2d 596, 603 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963); see *Beck* v. *Washington*, 369 U. S. 541, 555-58 (1962). But appellants did not meet these essential conditions. Being put to plea in New Haven, trial counsel for Costello and Gjanci sought trial in Bridgeport where the publicity had peaked, Marchetti did not object, and no motion for a continuance was made. When the judge examined prospective jurors on November 30, only three of the panel said they had read or heard about the cases, and none of them were chosen. The attack because of the publicity here described came only in a motion in arrest of judgment after

the verdict. This was too late; counsel could not speculate on a favorable verdict and then claim lack of "an impartial jury" when the gamble failed.

Although another episode as to publicity was properly raised, the objection fails on the merits. On December 3, the first day of actual trial, defense counsel, out of the jury's presence, moved for a mistrial because of an article in the Bridgeport Post of December 1 which reported that "six more suspected gamblers arrested by federal agents last October today submitted guilty pleas" and that Owens said he expected others to change their pleas to guilty. At the request of the United States Attorney and with the consent of defense counsel, the court asked the jury, most of whom came from the New Haven area, whether any of them had read anything about the case or related cases since their selection as jurors. None responded, and the motion was denied. Appellants say the jurors' silence did not necessarily reflect the truth since the jurors would not be likely to admit they had violated the judge's previous instructions not to read about the gambling prosecutions. Whatever the force of such a contention might or might not be where publicity subsequent to the selection of the jury could be seriously prejudicial, cf. *United States* v. *Agueci*, 310 F. 2d 817, 831-33 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), and cases there discussed, the December 1 article contained nothing that could deprive appellants of a fair trial. If one of appellants had pleaded guilty during the trial, the jury could have been so informed under proper caution. *United States* v. *Crosby*, 294 F. 2d 928, 948 (2 Cir. 1961), cert. denied, 368 U. S. 984 (1962); *United States* v. *Dardi*, 330 F. 2d 316, 332-33 (2 Cir.), cert. denied, 379 U. S. 845 (1964). In the light of that principle it is impossible to see what prejudice could result from a prediction that

other defendants, with no relation to appellants save having been seized in the raids of October 8, might change their not-guilty pleas.

III.

Ripa's testimony was received over a chorus of objections on the score of the hearsay rule. Whenever he testified as to a transaction or communication with one of the appellants, the others would object to its reception against them as hearsay; when he testified as to transactions or communications with other persons at the instance of one or more of the appellants, all three would object on that ground to its admission against any who were not present.

The objections betray a clear although common misconception of the nature of the hearsay rule. Only in a few instances was Ripa's testimony of declarations from which the jury was to accept the truth of the matter asserted, such as Gjanci's statement that Marchetti and Costello were his bosses. The basis for an objection in other cases, e.g., by Gjanci to testimony that Ripa had placed bets with Marchetti or with "Tony," is not at all that this is hearsay; the testimony of Ripa—himself on the stand subject to cross-examination—chiefly described acts, and no out-of-court utterance of Ripa, Marchetti or "Tony" was being offered to prove the truth of anything asserted in such utterance, 6 Wigmore, Evidence §1766 (3d ed. 1940); *Aikins* v. *United States*, 282 F. 2d 53, 57 (10 Cir. 1960); *United States* v. *Annunziato*, 293 F. 2d 373, 376-77 (2 Cir.), cert. denied, 368 U. S. 919 (1961). The proper objection is that, without more, Ripa's story as to a transaction with one person would not be relevant to prove the crime charged against another.

As the Supreme Court made clear in *Lutwak* v. *United States*, 344 U. S. 604, 617-19 (1953), there is a distinction

between acts and declarations with respect to admissibility. Out-of-court declarations of an alleged conspirator introduced to prove the truth of the matter asserted meet the obstacle of the hearsay rule; while always receivable against the declarant as an admission, they can be used against others, unless some other exception applies, only on independent proof of agency, see 4 Wigmore, *supra*, §1079, and the agency does not go beyond statements in furtherance of the conspiracy.[2] Evidence of an act (or a statement offered other than for its truth) has no special evidentiary hurdle to overcome and, whether the act is by a co-conspirator or third person and whether it occurs during the period of a conspiracy or not, the evidence is admissible so long as the act is probative of a crime charged against a defendant and the evidence is not excludable on some special ground.[3] Thus, the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to

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2 Since by hypothesis the conspiracy and defendant's participation must be independently established before the hearsay may be used against him, one may wonder at first blush what role remains for the declaration. Making this point, Judge L. Hand in *United States* v. *Dennis*, 183 F. 2d 201, 230-31 (2 Cir. 1950) (dictum), aff'd, 341 U. S. 494 (1951), suggested that the conspiracy and participation questions be independently decided by the trial judge and the hearsay then given to the jury without limitation. But even if the judge, as in the *Dennis* trial and in the present case, charges that the jury must itself resolve this "preliminary" question beyond a reasonable doubt, the hearsay may still be useful to the prosecution, for example to characterize the conspiracy as to purpose or date, or as evidence that defendant engaged in another crime for which he is on trial. See generally McCormick, Evidence §245, at 522 n. 33 (1954).

3 Paralleling the hearsay exception in evidence law—indeed, its very foundation in Wigmore's view, 4 Wigmore, *supra*, §1079, at 127-31—is the debated contention that a defendant will be liable for the substantive crime of another upon independent proof that the actor was furthering a conspiracy in which defendant was a member. See Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 993-1000 (1959). No such instruction was given in this case.

be linked by quite separate proof. An act of any other conspirator during the alleged conspiracy and in furtherance of it almost inevitably meets this test, and, as held in *Lutwak*, acts by such others even before or after the period of the conspiracy may still be relevant in suggesting its existence and its aims. See *United States* v. *Ross*, 321 F. 2d 61, 68-69 (2 Cir.), cert. denied, 375 U. S. 894 (1963).[4]

Subject to a general point made by Costello which we will mention below, this discussion suffices to dispose of the objections of Marchetti and Costello to the admission of Ripa's testimony as to the placing of bets with Gjanci between July 23 and 31, on the ground that the court had ruled only that a sufficient showing of conspiracy had been made for the period beginning August 12.[5] Even more clearly it disposes of the objection of each appellant to testimony as to conversations and transactions between Ripa and other appellants and non-parties after August 12. Ripa's testimony that Marchetti had called "Tony" and

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4 The briefs exhibit a common confusion in contending that evidence meeting the standard we have indicated would be admissible only under the conspiracy count; such evidence is admissible on substantive counts even when there is no conspiracy indictment at all. *United States* v. *Puglisee*, 153 F. 2d 497, 500 (2 Cir. 1945); *United States* v. *Annunziato*, *supra*, 293 F. 2d at 378; *United States* v. *Smith*, 343 F. 2d 847 (6 Cir. 1965).

5 We note also that although at the time of the admission of this evidence the court may have been satisfied only as to a conspiracy beginning August 12, other competent evidence later introduced warranted a finding that the conspiracy had existed from July 23 and, indeed, long before. Cf. *United States* v. *Dennis*, *supra*, 183 F. 2d at 231. The comments in the text and in this footnote apply also to the objection that the court allowed testimony as to acts subsequent to October 2, the last date to which the judge, in his initial ruling, had found the conspiracy extended. And there is nothing to Costello's special objection to the admission of evidence relating to acts on October 7, the day after the indictment had been found; the impounded indictment did not end the conspiracy, as the evidence obtained in the October 8 raids demonstrated.

arranged for Ripa to book with "Tony," with Ripa to settle up with him once a week, was plainly admissible against Marchetti and also against the other appellants so far as it might prove Marchetti engaged in a gambling conspiracy to which they might independently be linked. Gjanci's instructions that Ripa should bet with "Carl" and settle with him were admissible on the same basis. Once evidence of these instructions by Marchetti and Gjanci was admitted against appellants, Ripa's testimony that he had then placed bets with Tony and Carl was highly relevant; evidence that the names or telephone numbers led to a gambling enterprise tended to show that the man furnishing the information—and his independently linked co-conspirators—were part of that enterprise. Ripa, in the course of describing his transactions with the appellants and Tony and Carl, naturally told the jury what he himself said or did during the encounters, but this was not to charge his own behavior or statements to the conspirators but simply to provide the necessary context for understanding their conduct which he was relating. *United States* v. *Morello*, 250 F. 2d 631, 634 (2 Cir. 1957), relied on by appellants, simply held that an out-of-court declaration by an undercover agent acting as a conspirator could not be received against co-conspirators as their admission under the conspiracy exception to the hearsay rule. But as *Morello* itself indicated, the *act* of a co-conspirator was admissible for whatever it was worth against the defendants, although occurring outside their presence and without their knowledge, so long as their participation in the conspiracy was proved by independent evidence; and the undercover agent's description of his own conduct, apart from the use of his out-of-court statements for their truth, received no censure. 250 F. 2d at 634-35.

Costello argues there was no sufficient independent evidence to connect him with the conspiracy, stressing that Ripa did not meet him until September 14. However, Ripa's testimony as to what Costello said and did on that occasion and later amply justified a finding that Costello was one of the "bosses" and had been so from the outset. With the declarations of Gjanci as to Costello's role thus made competent, the contention that the Government failed to adduce sufficient evidence to warrant submission of Costello's case to the jury falls by the wayside.

A final objection relates to oral and written post-arrest statements by Marchetti, discussed in another context below. These were offered and received only against him. In his charge the judge said that the oral statements were received only against Marchetti, but that the written statement was received against all defendants in the conspiracy case although not in the substantive cases other than Marchetti's. No exception to the erroneous instruction was taken. It is plain that if one had been, the judge would have corrected his mistake. For reasons fully explained in *United States* v. *Kahaner*, 317 F. 2d 459, 478-79 (2 Cir.), cert. denied, 375 U. S. 836 (1963), we decline to notice the point.

IV.

As just indicated, Marchetti was interrogated after arrest by a Special Agent, who recorded his oral answers on a question sheet which Marchetti then signed. Apparently Marchetti was first warned of his right not to answer any questions but not of any right to confer with counsel. The agent's testimony and the question sheet were received in evidence against Marchetti without objection. After warning of his right not to answer questions that would incriminate him under federal law, another agent asked Gjanci if

he had a federal tax stamp and, this being answered in the negative, why not; Gjanci replied that he didn't accept wagers but "just play[ed] the numbers." No objection to this testimony was made.

Marchetti and Gjanci now urge that reception of this evidence violated their rights under the Assistance of Counsel clause of the Sixth Amendment as interpreted in *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and under F. R. Cr. P. 5(a) as implemented by *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957). The Government contends, *inter alia*, that Gjanci's statement was exculpatory (save as to his stipulated failure to have a tax stamp) and that Marchetti's failure to object was deliberate, since, there being overwhelming proof against him, his sole objective was to protect Costello, as the statement did. We find it unnecessary to examine these contentions. We held some years ago that we need not consider *McNabb-Mallory* objections not clearly made at trial, *United States* v. *Ladson*, 294 F. 2d 535, 538-39 (2 Cir. 1961), cert. denied, 369 U. S. 824 (1962). In the course of its *in banc* consideration of a number of cases involving *Massiah* and *Escobedo* claims arising out of trials after those decisions, the court has reached the same general conclusion, *United States* v. *Indiviglio*, —— F. 2d —— (1965), and we find no special circumstances warranting different action here.

We have carefully examined appellants' other claims of error but do not consider them to require discussion. The Court is indebted to Carroll W. Brewster and Kimberly B. Cheney, assigned counsel, for their presentation on Gjanci's behalf.

Affirmed.

Opinion of Court of Appeals in *U. S.* v. *Piccioli*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 489—September Term, 1964.

(Argued June 8, 1965 Decided October 29, 1965.)

Docket No. 29521

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARL A. PICCIOLI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for Connecticut, William H. Timbers, *Chief Judge*, convicting appellant, after a verdict, on a two-count indictment charging violation of 26 U. S. C. §7302 by wilful failure to pay the special gambling occupational tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412. Affirmed.

PHILIP BAROFF, Bridgeport, Conn. (Charles Hanken on brief), *for Appellant.*

HOWARD T. OWENS, JR., Assistant United States Attorney (Jon O. Newman, United States Attorney, District of Connecticut), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Piccioli was charged in a two-count indictment with violating 26 U. S. C. §7302 by wilful failure to pay the special gambling tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412, and was convicted on both counts before Chief Judge Timbers and a jury. He was sentenced on the first count to imprisonment for one year and a fine of $5,000; on the second, imposition of sentence was suspended and probation fixed at two years.

Piccioli was one of the proprietors of the Pin-Up Bar in Bridgeport. Special Agent Ripa of the I. R. S., testified (on cross-examination) that "Artie" Gjanci, a defendant in *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965), instructed that, through arrangement between himself and Piccioli, Ripa could place bets with Piccioli and that, when doing this by phone, he should say "This is Bill for Artie." Thereafter Ripa placed numerous horse race bets with Piccioli. There was evidence of furtiveness on Piccioli's part in accepting Ripa's wagers and paying his winnings. During the October 8 raid described in the *Costello* opinion, Special Agent Macolini obtained nearly $500 in cash and checks from Piccioli's pockets, along with three issues of a horse racing publication used by bookmakers. On that occasion in one hour a Connecticut State Trooper engaged in the search of the Pin-Up Bar received 23 calls from persons who were seeking to ascertain odds or, as the jury could properly infer, were about to place bets. Since this and other evidence warranted conviction, we turn to Piccioli's claims of error:

(1) Our *Costello* opinion details the publicity on October 8 and 9. When Piccioli was put to plea in New Haven on October 21, he requested that trial be had in Bridgeport, where the publicity had been most intense. On November

30 and December 1 four juries to try Piccioli's and other gambling cases were selected from the same venire, apparently with the understanding that the cases would be tried *seriatim;* the record shows no objection to that procedure and, when Piccioli's jury was being selected, the only venireman who recalled reading or hearing of his case was not chosen. His trial was adjourned until after that of Costello, Marchetti and Gjanci, which was widely publicized in the Bridgeport press. Piccioli's name figured in this, he being the "Carl" referred to in our opinion in that case; the papers reported he had been subpoenaed by the Government and had been excused at his lawyer's request. When Piccioli's case was called for trial on December 15, his counsel sought a new jury or a continuance because of the publicity given the Costello trial and Piccioli's involvement in it. The judge denied this but said he would inquire of the jurors, which he did without objection from counsel. When asked whether they had read or heard anything about the case or about Piccioli, there was no response.

In this aspect Piccioli's case is not significantly different from that of Costello, Marchetti and Gjanci. No objection on the score of the publicity on October 8 and 9 was made before the adverse verdict. The only issue relating to publicity which was brought to the judge's attention prior to trial was the newspaper accounts of the trial of Costello, Marchetti and Gjanci. A correct report of the trial and conviction of other persons for the same type of offense would not in and of itself be prejudicial, even when, as here, one of them figured in the evidence at the later trial; and there is no reason to suppose the jurors would read into the request that Piccioli be excused a claim of the privilege against self-incrimination. Moreover, we see no reason why the judge had to disbelieve the jurors' responses that the reports had not come to their attention.

(2) Another point has more merit but, in our view, not enough to demand reversal. Special Agent Macolini testified that after completing his search at the Pin-Up Bar, he told Piccioli and the latter's attorney, Mr. Hanken, who had entered the kitchen area in pursuit of a cup of coffee shortly after the raid, that he would like to ask "a few personal history questions"; that the attorney said he had instructed Piccioli not to answer questions; that Macolini then submitted his question sheet to Mr. Hanken; and that the attorney allowed Piccioli "to answer those personal history questions that were on the sheet." No objection was made to this, and the subject was not revived by counsel in cross, redirect, or recross examination. At the conclusion of Macolini's testimony, the judge reverted to this episode and, over objection by defense counsel, elicited an affirmative answer from Macolini to a question, "But the defendant was instructed in your presence by Mr. Hanken not to answer any questions with respect to whether or not he was accepting horse wagers on the premises." After listening to argument, the judge said, "I simply wanted to get it clear in my mind, and I assume the jury did also, as to precisely what happened," and then instructed "that, once the defendant was placed under arrest, it was his privilege under the Constitution not to answer any questions that might tend to incriminate him under Federal law . . . What brought the question on my part was, I was not quite sure what was meant by personal history questions, as distinguished from whatever questions he declined to answer." In submitting the case to the jury, the judge recounted Macolini's testimony and added that Mr. Hanken had a right to advise Piccioli not to answer questions and that Piccioli had a constitutional right not to do so.

Inquiry designed to establish that a defendant claimed the privilege against self-incrimination before a grand jury

or a legislative committee or failed to testify at a former trial has been held in several cases to constitute reversible error. See *Grunewald* v. *United States*, 353 U. S. 391, 415-24 (1957); *Stewart* v. *United States*, 366 U. S. 1 (1961); *United States* v. *Gross*, 276 F. 2d 816 (2 Cir. 1960). If the privilege attaches at the moment of arrest, as the judge assumed, inquiry to show its assertion at that time would seem equally banned.[1] And we would reach the same conclusion although that assumption is wrong and the right of an arrested person not to respond rests simply on the lack of any power in the police to compel testimony—a hotly controverted issue[2] which we need not here decide. Silence under such circumstances, at least when, as in this case, it results from the advice of an attorney, affords no fair ground for relevant inference, see *Kelly* v. *United States*, 236 F. 2d 746, 749 (D. C. Cir. 1956); yet a jury would be likely to give it not inconsiderable weight. As said by Mr. Justice Harlan in *Grunewald, supra*, 353 U. S. at 424, with respect to a claim of privilege before a grand jury, "the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used." Cf. *McCarthy* v. *United States*, 25 F. 2d 298 (6 Cir. 1928); *United States* v. *Pearson*, 344 F. 2d 430 (6 Cir. 1965).

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1 Presumably this is what is meant by the statement in *Fagundes* v. *United States*, 340 F. 2d 673, 677 (1 Cir. 1965), characterizing the right to remain silent on arrest as "akin to the right to decline to take the witness stand in one's own defense." See also *Helton* v. *United States*, 221 F. 2d 338, 340-42 (5 Cir. 1955); but see *Kelly* v. *United States*, 236 F. 2d 746, 750-51 n. 10 (D. C. Cir. 1956).

2 See 3 Wigmore, Evidence §2250, at 328-29 & n. 27 (McNaughton rev. 1940); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27-30 (1949); Note, The Privilege Against Self-Incrimination: Does It Exist in the Police Station?, 5 Stan. L. Rev. 457 (1953); 1 Morgan, Basic Problems of Evidence 146-48 (1961); Maguire, Evidence of Guilt §2.03, at 15-16 (1959).

The judge's question, for which the cold record affords no apparent reason, was thus ill-advised, to say the least. Nor was it cured, as the Government urges, by his subsequent instruction that the lawyer and Piccioli had been acting within their rights; the proper caution would have been that the evidence was to be disregarded and no inference drawn therefrom. But we cannot see that the question and answer added anything so significant to what Macolini had testified on his direct examination without objection as to afford sufficient basis for reversal, 28 U. S. C. §2111, F. R. Cr. P. 52(a).

(3) The final point requiring discussion is the contention that the judge took impermissible considerations into account in passing sentence.

Piccioli was sentenced on January 11, 1965, along with defendants in other gambling tax cases. In explaining the sentences in the *Costello, Marchetti* and *Gianci* cases, Chief Judge Timbers made certain remarks which we set forth in part in the margin.[3] He followed these by recommending

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3 "The Court regards these charges as serious. It is faced with the duty of imposing sentence following a finding of guilty by a jury.

"While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling.

"While it is perfectly true, and no one knows better than the Court, that the charge against these defendants was not that of gambling, it is equally true that the prosecutions never would have been brought and there never would have been convictions but for extensive gambling and accepting of wagers as demonstrated by the evidence.

"As this Court has observed before, one of the handmaidens of vice in any community—here graphically demonstrated in the Bridgeport community—one of the handmaidens of vice is that of gambling. The other two, with which this Court has dealt severely and will continue to deal severely, are those of narcotics and prostitution. Of course it is

that the United States Attorney forward a transcript of them and of the evidence to Connecticut prosecutors. Later, on February 8, before taking up the criminal calendar in New Haven, Chief Judge Timbers made a further statement about the gambling tax cases with which he had been concerned. In this statement, some nine printed pages long, he praised the work of the United States Attorney and his staff, of the Intelligence Division of the Internal Revenue Service, and of the Connecticut State Police; deprecated the absence of cooperation by the local Bridgeport police and "the apparent lack of willingness or ability on the part of certain of the prosecutors (in one instance under the pretense of 'public apathy,' which is pure, unadulterated bunk) and judges of the state circuit court to back up the local and state police in enforcing the gambling laws of this state"; and noted "the ground swell of public support throughout the state for what has been accomplished by this latest federal crackdown upon gambling and organized crime." After announcing his intention to impose stiff sentences for violation of the federal gambling tax and related laws, he ended by proposing that a Connecticut Conference on Law Enforcement be convened, and outlined a detailed program for its membership and activities.

The circumstances under which an appellate court will interfere with a sentence within the permissible maximum because of the judge's reliance on allegedly irrelevant cri-

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well known that the revenue from gambling is the financial basis or keystone upon which much of crime is built.

"The Court does not intend, in imposing sentence here, to deal out the slap on the wrist which has characterized sentences imposed by the State Courts for violations of the State gambling laws. The Court intends, by the sentences here to be imposed, to serve a stern warning, once again, as the Court has repeatedly in the past, that the United States is not powerless to deal effectively with violations of the Federal revenue laws and particularly the law here involved. It will do so, if need be, alone."

teria, see *United States* v. *Wiley*, 267 F. 2d 453 (7 Cir. 1959), are and, so long as such sentences are generally unreviewable, ought be rare. It would be wholly appropriate for the judge to look beyond Piccioli's failure to register and buy a $50 tax stamp and to consider the attendant substantial losses of revenue through his failure to pay the percentage tax on wagers, of which the judge had heard abundant evidence, even though that crime had not been charged. Cf. *United States* v. *Doyle*, —— F. 2d ——, —— (2 Cir. 1965). Piccioli's argument is thus reduced to the claim that the judge was enforcing not simply the federal laws which were his proper concern but state laws which were not. The record does suggest that the judge's indignation at what he had learned at the trials and from presentence reports may have led to statements in the prosecutorial area beyond his function. On the other hand, since he could have taken into account a record of state crimes and charges unrelated to the federal offense proved, it would be strange if he could not consider that the evidence showed a violation of state gambling laws and the effect of gambling on other state crime. Cf. *United States* v. *Doyle, supra.*

Piccioli's other points either are dealt with in *United States* v. *Costello* or lack sufficient merit for discussion.

Affirmed.

Opinion of Court of Appeals in *U. S.* v. *Grassia*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—September Term, 1965.

(Argued October 28, 1965 Decided November 26, 1965.)

Docket No. 29791

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFRED GRASSIA,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Defendant, having been charged in a two-count indictment, in the District Court for Connecticut, with willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411, in violation of 26 U. S. C. §7203, changed his plea of not guilty to one of *nolo contendere* on one count, and appeals from the resulting conviction by Judge Clarie. Affirmed.

JACOB D. ZELDES (David Goldstein, Bridgeport, Conn., on brief), *for Appellant.*

JON O. NEWMAN, United States Attorney for the District of Connecticut, *for Appellee.*

FRIENDLY, *Circuit Judge*:

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965), *United States* v. *Piccioli*, —— F. 2d —— (2 Cir. 1965), and *United States* v. *Markis*, —— F. 2d —— (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceedings in January and February, 1965, prior to Grassia's change of plea,[1] see *United States* v. *Costello, supra*, —— F. 2d at ——, slip opinion at 3325-26; *United States* v. *Piccioli, supra*, —— F. 2d ——, slip opinion at 3340-41, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere*, as the Government concedes. But, so far as this Court is concerned, they have been deter-

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1 The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

mined adversely to Grassia by *United States* v. *Costello, supra,* —— F. 2d ——, slip opinion, 3322-25. Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* —— U. S. —— (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.

As to Grassia's other contention, that his right to a fair trial was compromised by adverse publicity, the United States concedes that, at the time of the change of plea and the dismissal of the second count, counsel made clear to the prosecutor and the court that Grassia intended to press the point on appeal, contrast *United States* v. *Doyle,* 348 F. 2d 715, 720 (2 Cir. 1965); but it urges that a claim of the impossibility of obtaining an impartial trial is necessarily foreclosed when the defendant, freely and with the assistance of counsel, decides not to have one. Grassia responds that a defendant cannot be required to undergo a trial which the prosecution or the court has forced to occur at a place or a time that is inconsistent with the guarantees of the Sixth Amendment. His point is that the Amendment guarantees not only trial by an impartial jury but a "speedy" trial in the district where "the crime shall have been committed." He says that when this has been made impossible by the Government, as distinguished from third parties, the conventional remedies of extended continuance or change of venue are inappropriate since these involve a sacrifice of Sixth Amendment rights, and the only suitable remedy is dismissal of the indictment, thus rendering in-

consequential any plea of *nolo contendere* and waiver of trial.

We do not find it necessary to consider whether a case might conceivably arise where the Government's conduct in generating publicity had been so egregious and the prejudice engendered by it so pervasive, cf. *Irvin* v. *Dowd*, 366 U. S. 717 (1961), that the drastic sanction of dismissal of the indictment would be demanded, in the interest of the particular defendant or for general therapeutic purposes, or for both. It suffices for decision here that the hurdle confronting any such claim must be exceedingly high and that Grassia does not come close to meeting it. Although we disapprove of what seems to have been needless intensification by the Government of the news of the arrests and, still more, of the unnecessary statements by the Chief Assistant United States Attorney on the two following days, see *United States* v. *Costello, supra*, —— F. 2d at ——, slip opinion, 3326, it proved possible to obtain impartial juries even at Bridgeport where the publicity was at its peak, see *United States* v. *Piccioli, supra*, —— F. 2d at ——, slip opinion, 3336-37; *United States* v. *Markis, supra*, —— F. 2d at ——, slip opinion, 3344. Criminal defendants are understandably prone to exaggerate the interest their fellow citizens take in matters of such acute concern to them. The transfer of Grassia's trial to Hartford, also within the "district," on December 4 on his request, although doubtless prudent, thus did not result from any demonstrated impossibility of obtaining a speedy trial by an impartial jury in Bridgeport.[2] And although the fact that defendants arrested in the October raid were still awaiting trial rendered Chief Judge Timbers' statement of February 8, 1965, even

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[2] As indicated in *United States* v. *Costello, supra*, —— F. 2d at ——, slip opinion, 3327, jury panels at the terms held in Bridgeport are not limited to residents of that city.

more ill-advised than we indicated in *United States* v. *Piccioli, supra,* —— F. 2d at ——, slip opinion, 3342, we are wholly unconvinced that this pronouncement, combined with the preceding publicity generated by the prosecutor and the judge, made it so plainly impossible to obtain an impartial jury in Hartford as to relieve Grassia of any need to develop the facts by adhering to his plea of not guilty and examining the venire at Hartford on a voir dire.

Affirmed.

—241—

Excerpts From Testimony

RICHARD J. RYAN—for Government—direct.

* * * * *

A. * * * I asked him why he hadn't purchased a wagering stamp, and he said he didn't need one because he doesn't take bets, that he only gambles for a living.

* * * * *

And I asked him if he was accepting wagers, would he have registered and purchased a Federal wagering stamp, and he said he would have.

* * * * *

—68—

The Court: * * *

* * * * *

But acting consistently with the way I have attempted to from the outset, I will reserve decision on the defendant's motion to strike, and grant leave to the Government forthwith to connect, if it is able to do so, the defendant with these conversations or the placing of these wagers to which Mr. Ripa has testified—absent which connection I of course will strike the testimony.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 848

STANLEY MARKIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–12a) is reported at 352 F. 2d 860.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1965. Petition for rehearing was denied on November 26, 1965. The petition for a writ of certiorari was filed on December 24, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should reexamine, in light of *Albertson* v. *Subversive Activities Control Board*,

382 U.S. 70, its holdings in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, that the registration requirement of the 26 U.S.C. 4412 does not violate the Fifth Amendment privilege against self-incrimination.

2. Whether this Court should reexamine its holding in *Kahriger* that the wagering tax provisions do not violate the Tenth Amendment.

3. Whether petitioner was entitled to a new trial because of pretrial publicity generated by his arrest.

4. Whether evidence was obtained as a result of an unlawful arrest or seizure.

5. Whether hearsay testimony was admitted which deprived petitioner of his Sixth Amendment right to be confronted with the witnesses against him.

6. Whether petitioner is entitled to a new trial because of the trial court's refusal to instruct as to a lesser included offense.

STATUTES INVOLVED

26 U.S.C. 7203:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon con-

viction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. 7262:

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

STATEMENT

Petitioner was convicted on a two-count indictment charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by 26 U.S.C. 4412. He was sentenced to imprisonment for one year and fined $10,000 on the first count, and he received a suspended sentence and probation for two years on the second count.

During August and September, 1964, a special agent of the Internal Revenue Service placed numerous bets with John Mento at the latter's service station. As each bet was placed, the agent observed Mento dial telephone number 336-0254, ask for "Joe" or "Stash," and repeat the bet. Telephone company records disclosed that the number was an unlisted one in the name of "Mrs. Peggy D'Onofrio," Apartment C-6, 2225 Main Street, Bridgeport, Connecticut, and investigation by revenue agents disclosed no person of that name living at that address. The agents, however, observed petitioner (whose name they did not

know at the time)[1] regularly unlock the apartment and enter it at 11:00 or 11:30 a.m., carrying pads, scratch sheets and newspapers, and remain until 4:45 p.m.; the time petitioner spent at the apartment was the usual period of the day for placing and accepting bets by telephone (Gov. C.A. App. 3a–7a). The records of the district Internal Revenue office disclosed that only eight persons in the State of Connecticut possessed wagering tax stamps at the time, and that none of them resided or had a place of business in Bridgeport (Gov. C.A. App. 8a–9a).

On the basis of the foregoing information, a search warrant for the apartment was obtained on October 1, and an arrest warrant for petitioner (designated by his appearance and as "John Doe, a/k/a 'Joe' or 'Stash,'") was obtained on October 5. Substantially the same information was contained in the affidavit in support of the search warrant and in the subsequent complaint in support of the arrest warrant, except that a separate affidavit setting forth the results of the search of Internal Revenue records was attached only to the former. Both warrants were issued by the same commissioner, and the affidavits and the complaint were all sworn to before him. When the arrest warrant was obtained, the affidavits in support of the search warrant were presented to the Commissioner to refresh his recollection (Gov. C.A. App. 1a–2a).

When execution of the two warrants was attempted, the door to the apartment was at first barricaded;

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[1] Petitioner was later introduced by the nickname "Stash" to the agent who placed the bets with Mento (Pet. App. 2a–3a).

when the arresting agents were finally admitted by petitioner, they found a quantity of paraphernalia useful for the conduct of a gambling business, the telephone (bearing the number 336-0254) torn from the wall, and betting slips flushed down the toilet. When the agents repaired the telephone, unknown voices called and sought to place bets with "Stash" or "Joe." Upon admitting the agents, petitioner acknowledged that he was known by those two names. He was interviewed while still in the apartment (after having his rights explained to him) and asked why he had not purchased a wagering tax stamp. He answered that he did not need one because he did not take bets but only gambled for a living. He said that if he were in the business of accepting wagers he would have registered and purchased the stamp (Pet. App. 3a-4a). Among the items seized by the agents at the apartment (along with sporting newspapers, betting slips, pens for making out such slips, a calendar for checking races, and the telephone) were rent receipts for the apartment and bills for telephone service, none of which were made out in petitioner's name (Pet. App. 6a-7a).

ARGUMENT

1. Petitioner was one of approximately forty-five individuals arrested on October 8, 1964, in connection with violations of the wagering tax statute in the Bridgeport, Connecticut area. His contentions here in regard to the asserted unconstitutionality of the statute when measured against the Fifth and Tenth Amendments are the same as those raised in the peti-

tions filed this term by James Marchetti (No. 823), Frank Costello (No. 826) and Arthur Gjanci (No. 1028 Misc.), and are treated in our combined brief in answer to those petitions. See, also, *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838. Our answer in that brief to the contention in regard to prejudicial pretrial publicity also applies here, with the added observation that—unlike the petitioners in Nos. 823, 826 and 1028 Misc.—petitioner here was not personally named in the press release announcing the arrests; in addition, like the petitioners in Nos. 826 and 1028 Misc., petitioner here requested trial in Bridgeport, where the arrests had taken place and publicity had been the most intense (Pet. App. 2a).

2. Petitioner urges that he was not arrested pursuant to a valid warrant because, in issuing the warrant, the Commissioner relied not only upon the complaint, but also upon two affidavits submitted to him four days previously in connection with the application for the search warrant covering the apartment where petitioner was arrested (Pet. 23–27). The complaint and the two affidavits, taken together, clearly constituted a detailed recital, under oath, of facts showing that petitioner was engaged in the business of receiving wagers without having purchased the necessary stamp. The Commissioner was thus unquestionably enabled "to assess independently the probability that petitioner committed the crime charged." *Giordenello* v. *United States*, 357 U.S. 480, 487; see *Jaben* v. *United States*, 381 U.S. 214, 224–225. As the court of appeals held (Pet. App. 6a), the fact that the

recitals contained in the affidavits were not formally restated in the complaint did not invalidate the warrant in these circumstances. See *United States* v. *Ventresca*, 380 U.S. 102, 108.

Petitioner also urges that certain rent receipts and telephone bills were not properly seized as "instrumentalities and means by which" the crime was committed (Pet. 32–36; see F.R. Crim. P. 41(b)(2)). Petitioner was lawfully arrested, however, and the items were properly seized as an incident to that arrest. *Marron* v. *United States*, 275 U.S. 192, 198–199.[2] In addition, as the court of appeals noted (Pet. App. 7a), these items were of no significant evidentiary value here. Neither the receipts nor the bills were in petitioner's name. They were relevant only to show that petitioner rented the apartment and the telephone under an assumed name—facts fully established by uncontroverted independent evidence.

3. Petitioner contends that his conviction rested upon hearsay, and thus violated the Sixth Amendment, because the arresting agent testified that he placed

[2] It is immaterial that, as petitioner points out (Pet. 33), the court of appeals considered only the search warrant as justification for the seizure, since the arresting officers had dual authority (from both the search warrant and the lawful arrest) to conduct their search. This is not a case such as *Giordenello* v. *United States*, *supra*, 357 U.S. at 488, where belated injection of a new theory unfairly deprives petitioner of an adequate opportunity to respond. Petitioner, from the beginning, has availed himself of the opportunity to attack the validity of the arrest, and there was no additional evidence which he could have adduced or cross-examination in which he could have engaged which could possibly have developed that the arrest, although lawful, did not justify the seizure.

wagers with Mento, and that in each instance Mento dialed telephone number 836-0254, asked for "Joe" or "Stash," and repeated the bet (Pet. 27-32). This evidence, however, was not hearsay. It became relevant when connected with the facts that petitioner was known by the names "Joe" and "Stash," that he rented both the telephone with number 336-0254 and the apartment where it was located, and that calls seeking to place wagers with "Joe" and "Stash" were received by the agent on that telephone after the arrest. Mento's conduct thus essentially constituted circumstantial proof of petitioner's guilt, not extrajudicial assertions introduced as bearing upon petitioner's guilt because of their truth.

4. Finally, petitioner contends that he was entitled to an instruction concerning a lesser included offense (Pet. 18-23). The necessity for giving such an instruction depends upon the existence of "disputed issues of fact which would enable the jury rationally to find that" the defendant had committed the lesser but not the greater offense. *Sansone* v. *United States*, 380 U.S. 343, 351. In *Altiere* v. *United States*, No. 100, O.T., 1965, decided January 17, 1966, the United States thus conceded that, in a prosecution under 26 U.S.C. 7203 for willful failure to purchase a tax stamp and to register as required by 26 U.S.C. 4411 and 4412, the defendant was entitled to an instruction concerning the lesser offense of non-willful failure embraced by 26 U.S.C. 7262 because proof of defendant's knowledge of the registration and stamp requirements was left to inferences to be drawn from his general conduct. In such a case, we agreed, the

jury could rationally find failure to pay and register while at the same time finding that the failure had not been willful. See Memorandum for the United States in No. 100, O.T., 1965.

After considering petitioner's contentions based upon *Sansone* and the government's Memorandum in *Altiere*, the court of appeals held that those principles did not apply in this case (Pet. App. 7a–12a). This decision was correct. Petitioner here offered no evidence, resting his defense upon his exculpatory statement to the arresting agent that he did not need a wagering tax stamp because he did not take bets but only gambled for a living (Pet. App. 4a). Petitioner thus did not claim lack of knowledge of the requirements of Sections 4411 and 4412—indeed he acknowledged his familiarity with them. His claim was that he was not in the business of taking bets and thus was not within the ambit of those two sections. Thus, once the jury found that petitioner was in fact in the business of taking bets—a finding necessary to conviction under either Section 7203 or Section 7262—there was no way in which they could rationally have found him guilty of the lesser but not the greater offense unless they found that petitioner genuinely believed that his actual activities—as opposed to those he claimed to be engaged in—did not constitute the business of taking bets. Petitioner made no such claim at the trial and, as the court of appeals found, "there was nothing to suggest that the activity proved against him was so close to the line that he might reasonably have thought the law inapplicable to it" (Pet. App. 12a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

FEBRUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

FILED
JAN 26 1966
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 64

ALBERT P. MORETTI,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

W. PAUL FLYNN
132 Temple Street
New Haven, Connecticut 06510
Counsel for Petitioner

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

ALBERT P. MORETTI,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on November 26, 1965.

OPINION BELOW

The opinion of the Court of Appeals is thus far unreported, and is reprinted in Petitioner's Appendix. Related opinions are also printed in Appendix A (p 18*a*).*

* References in parentheses are to Petitioner's Appendix.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS

The Constitutional provisions involved are the Fourth and Fifth Amendments.

STATUTORY PROVISIONS

The statutes involved are 26 U.S.C. Sections 4401, 4411, 4412, 7203 and 18 U.S.C. 3109.

STATEMENT OF THE CASE

On October 1, 1964, Special Agent Thomas E. Grillo executed an affidavit purporting to establish that Petitioner was engaged in bookmaking activities and had concealed in his apartment certain material in violation of Title 26 United States Code, Sections 4401, 4411, 4412, 7203 (pp 37*a*-40*a*). Also submitted with the affidavit were a chart prepared by Special Agent Victor D. Palaza (p 41*a*), and an affidavit of Special Agent George Politis (p 42*a*). The search warrant was issued (p 43*a*) on October 1, 1964. On October 8, 1964, according to his affidavit (p 45*a*) Special Agent Antonio J. Lupino, armed with the search warrant, went to Petitioner's apartment, knocked on the door, announced his authority and purpose, waited 20-25 seconds and not having heard a response, gave instructions to break the door down. Based upon the material and evidence seized in Petitioner's apartment the United States Attorney

issued a two count information (p 44a) charging violations of 26 United States Code, Sections 4411 and 4401. A plea of not guilty was entered by Petitioner.

After notifying the District Court and the Government of his intention to appeal, the Petitioner submitted and the Court accepted his plea of Nolo Contendere to Count One of the Information, on February 16, 1965. Petitioner was sentenced to be imprisoned for a period of one year and fined Three Thousand Dollars, execution of the term of imprisonment to be suspended after four months, and the Petitioner was thereafter to be placed on probation for two years.

Thereafter, Petitioner appealed to the Court of Appeals for the Second Circuit; on November 26, 1965, his conviction was affirmed.

ISSUES PRESENTED

I. THE REGISTRATION PROVISIONS OF 26 U.S.C., Sections 4401, 4411 and 4412 VIOLATE THE FIFTH AMENDMENT.

II. THE FOURTH AMENDMENT ISSUES SURVIVED THE PLEA OF NOLO CONTENDRE.

III. THE AFFIDAVITS WERE INSUFFICIENT TO ESTABLISH PROBABLE CAUSE.

IV. THE AGENTS WERE NOT REFUSED ENTRY WITHIN THE MEANING OF 18 U.S.C. 3109.

REASONS FOR GRANTING THE WRIT.

I. The Registration Provisions Violate the Fifth Amendment.

This Court has decided on two occasions that the registration provisions relating to the federal occupational tax stamp are not violative of the Fifth Amendment privilege against self-incrimination. See *U.S.* v. *Kahriger* 345 U.S. 22 and *U.S.* v. *Lewis* 348 U.S. 419.

While at first blush *Lewis* appears to be no more than an affirmation of *Kahriger*, in reality the decisions stand upon entirely different footings. *Kahriger* held that the privilege relates only to past acts, and since the registration provisions require disclosures only as to future acts there was not a violation of the privilege. In *Lewis*, where the distinction between past and future acts was not so clear because federal laws in the District of Columbia prohibited wagering, the Court based its decision upon the fact that the registration provisions cannot be called compulsory.

Subsequent decisions by this Court, enlarging and restating the principle and purpose of the privilege against self-incrimination, necessitate a more explicit and definitive application of the privilege to the registration provisions of the federal wagering tax laws.

The result in *Kahriger* followed logically from *U.S.* v. *Murdock*, 284 U.S. 141. However, *Murdock* was expressly overruled in *Murphy* v. *Waterfront Comm.*, 378 U.S. 52, the latter case holding that the privilege protects against a disclosure to federal authorities that might incriminate under state law. Prior to *Murphy* the registrant was protected from disclosing to federal authorities only that information that could subject him to prosecution under federal law. Since

Kahriger could not claim that his disclosure would incriminate him under state law, and since the only possible incrimination under federal law related to acts *in futoro*, the privilege was held not to have been violated.

However, with the enlargement of the privilege by *Murphy*, the disclosures can no longer be classified as harmlessly relating to future acts. By encompassing the possibility of state prosecution within the privilege against self-incrimination the court demonstrated its recognition that, "in our age of 'cooperative federalism' where the Federal and State Governments are waging a united front against many types of criminal activity" the privilege must be protected in both spheres. cf. *Murphy* v. *Waterfront Comm., supra,* pp. 55-56.

In determining the extent of the privilege, therefore, we cannot confine ourselves merely to a consideration of incrimination under federal law, as was done in *Kahriger*. Indeed, if we do, the inevitable conclusion must be that there is no violation of the privilege because there are no federal laws making wagering a crime; and the registration disclosed merely an intention to engage in wagering. *Murphy* requires that we consider the possibility of state prosecution, and, when we do, the plethora of state criminal gambling statutes obviously makes registration a disclosure of past acts, not simply future intention.

In Connecticut, for example, the registrant exposes himself to prosecution under Sections 53-271 to 53-279, Secs. 53-295 to 53-297. (p 32*a*-37*a*).

Aside from violations of the substantive law, the Connecticut registrant exposes himself to prosecution under Sec. 54-197 for conspiracy, a conviction of which can certainly be obtained from the information required to be supplied in the registration

form. The registration, if complied with, provides state authorities with crystal clear evidence that the registrant has, for example, combined or confederated with others for the purpose of engaging in the business of wagering; cf. *State* v. *Fallaice*, 134 Conn. 181. Certainly the listing of employees and agents on I.R.S. form 11-c (p 48*a*) as required by 26 U.S.C. Sections 4412 (p 29*a*) and 6011 is tantamount to an admission that there has been an agreement with these persons to be employees or agents in the business of wagering. Disclosure of the business address at which wagering is carried on could lead authorities to a lease, purchase of real estate or other rental agreement for the purpose of showing overt acts in furtherance of the conspiracy. *State* v. *McLaughlin*, 132 Conn. 325, 340.

Far from a harmless expression of future acts, the disclosures present a very real danger to the registrant, a link in the chain of evidence that may be used against him in a state prosecution. He is constitutionally privileged not to disclose the information required. *Malloy* v. *Hogan*, 378 U.S. 1.

Lewis v. *U.S.*, *supra*, presents a different obstacle in the assertion of petitioner's privilege, for that case held that the registration was not compulsory.

While compulsion in connection with the privilege against self-incrimination may traditionlly have been looked upon as some form of torture, it certainly is not so viewed today. In *Malloy* v. *Hogan*, *supra*, we find that compulsion is equated with, among other things, a threat of imprisonment.

A recent case, *Albertson* v. *Committee on Subversive Activities* — *U.S.* — holds that a person cannot be forced to choose between incriminating himself and going to jail. The latter case is particularly apposite to the case at bar, for it involved registration of Communist Party members, who would,

upon completing the registration form, expose themselves to federal prosecution. The possibility that the federal government would prosecute those registering as Communist Party members together with the criminal penalties involved for not registering prompted this Court to reverse the conviction because the statute required the registering Communist to incriminate himself. The statute compelled self-incrimination because it imposed a criminal penalty for not complying with its command of registration.

This Petitioner was under just as much compulsion to register by the statute that afforded the basis for his conviction.

Moreover, the *Albertson* case distinguishes *U.S.* v. *Sullivan* 274 *U.S.* 259, wherein it was held that, in a prosecution for failing to file income tax returns, the privilege against self-incrimination did not apply because no return was filed at all by the defendant. The criminal atmosphere surrounding the Communist registration statute was held sufficient justification, under the Fifth Amendment, for a total refusal to register. The same atmosphere surrounds the gambling registrant, and the same reasoning must justify his failure and/or refusal to register under the wagering law.

In their time, *Kahriger* and *Lewis* correctly expounded the scope of the privilege against self-incrimination. They can no longer be reconciled with more recent decisions so as to deny Petitioner's claim that his Fifth Amendment privilege against self-incrimination protects him from registering. The information required by the registration form "might be used as evidence in or at least supply investigatory leads to a criminal prosecution." *Albertson* v. *Subversive Activities Control Board* — *U.S.* — 34 LW 4014, 4016. Furthermore, the so-called prospective operation of the wagering tax laws referred to in *Kahriger* and *Lewis* as the basis of finding that the Fifth Amend-

ment was not infringed upon by the registration provisions has been nullified by *Albertson*. The latter case holds that the privilege is violated despite the fact that Communist Party members could terminate their membership within 30 days after entry of a Section 786(a) order directed to the party and thus avoid individual registration. *Ibid.* 34 LW 4014.

II. The Fourth Amendment Issues Survived the Plea of Nolo Contendere.

Admittedly, under ordinary circumstances, Fourth Amendment issues do not survive a plea of nolo contendere. However, in this case, Petitioner notified the District Court and the prosecutor of his intention to appeal before entering a plea of nolo contendere. While this reservation does not appear on the record, it was recited in Petitioner's statement of facts included in his appeal to the Second Circuit Court of Appeals. The government did not dispute this fact. Nevertheless, the Second Circuit refused to review the Fourth Amendment issues raised by Petitioner on the ground that those issues did not survive the plea of nolo contendere.

This Court has granted certiorari in cases after a plea of nolo contendere where the right of appeal was expressly reserved. *Jaben* v. *U.S.*, 379, *U.S.* 878. The Second Circuit Court of Appeals has indicated that it would review issues despite a plea of nolo contendere if the appellant notifies the trial court of his intention to appeal. *U.S.* v. *Doyle*, 348 F.2d 715, 720 (2 Cir. 1965). And the Second Circuit Court did in fact entertain an appeal after a plea of nolo contendere in *U.S.* v. *Grassia* — F.2d. — (p 18*a*) where the appellant reserved the right to appeal in the district court.

True, in this case, Petitioner's reservation does not appear

on the record. However, his uncontroverted statement of facts contained in the appeal to the Second Circuit is the equivalent of a statement for the record. Petitioner urges the Court to review the questions raised below.

III. The Affidavits Were Insufficient to Establish Probable Cause.

The Affidavit submitted in support of the search warrant may be summarized as follows:

1. A reliable informant who furnished reliable information in the past told the affiant that Petitioner was engaged in bookmaking activities.

2. Another reliable informant who furnished reliable information in the past told affiant that Petitioner was a bookmaker using telephone number 367-8261.

3. Telephone company records reveal that the above number is listed in Petitioner's name at the address to be searched.

4. Affiant's experience shows that calls to and from known bookmakers is indicative of the fact that a place is being used for bookmaking purposes.

5. Certain calls were made to and from known bookmakers.

6. Petitioner does not have a wagering tax stamp.

The bare allegations that the affiant was informed by a reliable informant that Petitioner was a bookmaker and that another reliable informant told the affiant that Petitioner was using a certain telephone number in his bookmaking activities

are insufficient. The magistrate must be informed of some of the underlying circumstances upon which the informant has based his conclusion. Otherwise the affidavit does not satisfy the probable cause requirement.

Aguilar v. *Texas*, 378 U.S. 108 (1964)

The affidavit may have properly established probable cause if, for example, it recited that the first informer knew petitioner was bookmaking because the informer placed a wager with Petitioner; or, that the second informer knew that Petitioner was using the stated telephone number in his bookmaking activity because he called that number and placed a wager with Petitioner. The "underlying circumstances" supporting the informer's conclusion need not be the result of personal observation by the informer, they may be based on hearsay. However termed, *Aguilar* requires that the magistrate be informed of them, otherwise the affidavit is insufficient. See *Jones* v. *U.S.*, 362, U.S. 257, where it was held that the affidavit did establish probable cause because it contained a statement explaining the basis of the informer's knowledge: he had purchased narcotics from defendant in the apartment sought to be searched.

With the elimination of that portion of the affidavit containing the informers' statements, very little remains in support of establishing probable cause. Petitioner contends that without the informers' statements the affidavit is not an allegation of probable cause.

Moreover, the allegation purporting to establish a pattern of telephone calls to and from known bookmakers was based upon a check of telephone company records from "April through September, 1964." The date of each call is not set forth, and the only conclusion to be reached from the allega-

tion is that sometime during the period of April through September, 1964, telephone calls were made and were of such a nature as to indicate a bookmaking operation.

This allegation must fail in contributing to the establishment of probable cause because it is too remote. Courts take the view that for the purpose of testing the remoteness of a statement reciting activity "within" a certain period of time, the statement must be treated as if the activity took place on the farthest remote date within the period.

Affidavit for Search Warrant 162 A. L. R. 1406

The telephone calls, therefore, should all be treated as having taken place sometime in April. Since the affidavit in support of the search warrant was executed in October, the facts recited to establish a pattern of calls indicating the existence of a bookmaking operation are too remote in point of time. *Ibid.*

IV. The Officers Were Not Refused Entry.

The affidavit of the federal agent describing the manner in which the search warrant was executed states that he knocked, announced his authority and purpose. He did not receive a reply so he tried the doorknob and found the door locked. He waited 20-25 seconds and then ordered that the door be broken.

Title 18 U.S.C.A., Section 3109 permits a forcible entry when officers are "refused entry." An affirmative refusal is not required before the officers may break in under this section. However, in all the cases decided to date, we find that the officers were held to have been justified in breaking in either because they heard sounds indicating that evidence was to be destroyed or because the occupants were attempting to escape. No case has been decided in which silence alone has been held

to be a refusal within the meaning of Section 3109. One case, *U.S.* v. *Viale*, 312 F.2d 595 (2d Cir., 1962) in a footnote statement, declared that silence alone was sufficient. That case is distinguishable from the case at bar, because in *Viale* the agents knew that the defendants were in the apartment; whereas there is no indication whatsoever that the agents in this case knew that Moretti was in the apartment.

The issue we raise does not concern the sufficiency or length of time that lapsed between the announcement of authority and purpose and the breaking of Petitioner's door. We do not expect this Court to render a "stop-watch" decision. We are concerned with heart of the statute. "Refused entry" is not defined in the statute; we concede that there need not be an affirmative refusal. Nevertheless, there must be a refusal, whether it be implied, inferred, suspected or affirmative. Whatever the form of refusal, it can only come from an occupant. It is pure conjecture to conclude that police officers are refused entry to an unoccupied apartment because a response to their announcement is not forthcoming. No one is there to refuse them entry. The statute would prevent breaking into an unoccupied apartment to execute a search warrant. The Petitioner was present when the federal agents arrived to execute the search warrant. However, the silence that followed their announcement could only be indicative of the fact that the apartment was unoccupied. They could not conclude, because of the silence, that they had been refused entry.

CONCLUSION

For the reasons stated it is respectfully submitted that the court grant this Petition.

Respectfully submitted,

W. PAUL FLYNN
Counsel for the Petitioner.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 154—September Term, 1965.
(Submitted November 10, 1965
Decided November 26, 1965.)
Docket No. 29789

UNITED STATES OF AMERICA,
Appellee,

—v.—

ALBERT P. MORETTI,
Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Defendant, having been charged in a two-count information, in the District Court for Connecticut, with willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411 in violation of 26 U. S. C. §7203, changed his plea of not guilty to one of *nolo contendere* on one count, and appeals from the resulting conviction by Judge Clairie. Affirmed.

W. PAUL FLYNN and FRANK J. RACCIO, New Haven, Connecticut, *for Appellant.*
JON O. NEWMAN, United States Attorney for the District of Connecticut, *for Appellee.*

PER CURIAM:

Albert P. Moretti was arrested on October 8, 1964, in the course of the raids relating to enforcement of the federal wagering tax, at Bridgeport, Connecticut, which have resulted in a number of appeals to this Court. Represented by counsel and duly questioned by Judge Clarie, he changed a plea of not guilty to one of *nolo contendere* to one count of a two-count information charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. Moretti appeals from the resulting judgment of conviction on two grounds: (1) that the federal wagering tax statutes violate the privilege against self-incrimination conferred by the Fifth Amendment; and (2) that the search of his apartment, which produced evidence on which the prosecution was based, was unlawful in that it was not authorized by the forcible entry provisions of 18 U. S. C. §3109 because the arresting officers were not refused entry, and violated the Fourth Amendment because the affidavits supporting the search warrant were insufficient to establish probable cause.

The first contention, which the Government concedes to be open despite the plea of *nolo contendere,* has been decided adversely to Moretti, so far as this Court is concerned, by *United States* v. *Costello,* —— F.2d —— (1965), slip opinion 3319 at 3322-25, and *United States* v. *Grassia.* —— F.2d. ——, this day decided. The second contention does not survive the plea. *Thomas* v. *United States,* 290 F.2d 696 (9 Cir. 1961), motion for leave to file petition for certiorari denied, 368 U.S. 964 (1962); see *United States ex rel. Boucher* v. *Reincke,* 341 F.2d 977, 980-81 (2 Cir. 1965). There is no force in Moretti's contention that since he could not have appealed from the denial of his motion to suppress the evidence obtained by the

search, *DiBella* v. *United States*, 369 U.S. 121 (1962), refusal to hear him now would frustrate assertion of a constitutional right; he could have preserved all his rights by standing trial and raising a proper objection to introduction of the fruits of the search if the Government chose to offer them.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—September Term, 1965.

(Argued October 28, 1965 Decided November 26, 1965.)

Docket No. 29791

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFRED GRASSIA,

Appellant.

Before:

LUMBARD, *Chief Judge,*

FRIENDLY and SMITH, *Circuit Judges.*

Defendant, having been charged in a two-count indictment, in the District Court for Connecticut, with willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411, in violation of 26 U. S. C. §7203, changed his plea of not guilty to one of *nolo contendere* on one count, and appeals from the resulting conviction by Judge Clarie. Affirmed.

JACOB D. ZELDES (David Goldstein, Bridgeport, Conn., on brief), *for Appellant.*

JON O. NEWMAN, United States Attorney for the District of Connecticut, *for Appellee.*

FRIENDLY, *Circuit Judge*:

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States* v. *Costello*, —— F.2d —— (2 Cir. 1965), *United States* v. *Piccioli*, —— F.2d —— (2 Cir. 1965), and *United States* v. *Markis*, —— F.2d —— (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same

constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceeding in January and February, 1965, prior to Grassia's change of plea,[1] see *United States* v. *Costello, supra,* —— F.2d at ——, slip opinion at 3325-26; *United States* v. *Piccioli, supra,* —— F.2d ——, slip opinion at 3340-41, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere,* as the Government concedes. But, so far as this Court is concerned, they have been determined adversely to Grassia by *United States* v. *Costello, supra,* —— F.2d ——, slip opinion, 3322-25. Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* —— U.S. —— (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.

As to Grassia's other contention, that his right to a fair trial was compromised by adverse publicity, the United States concedes that, at the time of the change of plea and the dismissal of the second count, counsel made clear to the prosecutor

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[1] The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

and the court that Grassia intended to press the point on appeal, contrast *United States* v. *Doyle*, 348 F.2d 715, 720 (2 Cir. 1965); but it urges that a claim of the impossibility of obtaining an impartial trial is necessarily foreclosed when the defendant, freely and with the assistance of counsel, decides not to have one. Grassia responds that a defendant cannot be required to undergo a trial which the prosecution or the court has forced to occur at a place or a time that is inconsistent with the guarantees of the Sixth Amendment. His point is that the Amendment guarantees not only trial by an impartial jury but a "speedy" trial in the district where "the crime shall have been committed." He says that when this has been made impossible by the Government, as distinguished from third parties, the conventional remedies of extended continuance or change of venue are inappropriate since these involve a sacrifice of Sixth Amendment rights, and the only suitable remedy is dismissal of the indictment, thus rendering inconsequential any plea of *nolo contendere* and waiver of trial.

We do not find it necessary to consider whether a case might conceivably arise where the Government's conduct in generating publicity had been so egregious and the prejudice engendered by it so pervasive, cf. *Irvin* v. *Dowd*, 366 U.S. 717 (1961), that the drastic sanction of dismissal of the indictment would be demanded, in the interest of the particular defendant or for general therapeutic purposes, or for both. It suffices for decision here that the hurdle confronting any such claim must be exceedingly high and that Grassia does not come close to meeting it. Although we disapprove of what seems to have been needless intensification by the Government of the news of the arrests and, still more, of the unnecessary statements by the Chief Assistant United States Attorney on the two following days, see *United States* v. *Costello*, *supra*, —— F.2d at ——, slip opinion, 3326, it proved possible to obtain impartial juries

even at Bridgeport where the publicity was at its peak, see *United States* v. *Piccioli, supra,* —— F.2d at ——, slip opinion, 3336-37; *United States* v. *Markis, supra,* —— F.2d at ——, slip opinion, 3344. Criminal defendants are understandably prone to exaggerate the interest their fellow citizens take in matters of such acute concern to them. The transfer of Grassia's trial to Hartford, also within the "district," on December 4 on his request, although doubtless prudent, thus did not result from any demonstrated impossibility of obtaining a speedy trial by an impartial jury in Bridgeport.[2] And although the fact that defendants arrested in the October raid were still awaiting trial rendered Chief Judge Timbers' statement of February 8, 1965, even more ill-advised than we indicated in *United States* v. *Piccioli, supra,* —— F.2d at ——, slip opinion, 3342, we are wholly unconvinced that this pronouncement, combined with the preceding publicity generated by the prosecutor and the judge, made it so plainly impossible to obtain an impartial jury in Hartford as to relieve Grassia of any need to develop the facts by adhering to his plea of not guilty and examining the venire at Hartford on a voir dire.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 481/2/3/4—September Term, 1964.
(Argued June 8, 1965 Decided October 29, 1965.)
Docket Nos. 29524/5/6/7

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2 As indicated in *United States* v. *Costello,* supra —— F.2d at ——, slip opinion, 3327, jury panels at the terms held in Bridgeport are not limited to residents of that city.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI and ARTHUR GJANCI,

Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COSTELLO,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES "TOTTO" MARCHETTI,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTHUR GJANCI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeals from judgments of the District Court for Connecticut, William H. Timbers, *Chief Judge*, convicting appellants, after a verdict, of offenses under the federal wagering tax laws. Affirmed.

PHILIP R. SHIFF, New Haven, Conn. (Adrian W. Maher, on brief) *for Appellant Frank Costello.*

JACOB D. ZELDES, Bridgeport, Conn. (Francis J. King, David Goldstein, Joseph S. Catalano, on brief), *for Appellant Marchetti.*

CARROLL W. BREWSTER (Gumbart, Corbin, Tyler & Cooper, New Haven, Conn.) Kimberly B. Cheney, on brief), *for Appellant Gjanci.*

JON O. NEWMAN, United States Attorney (Howard R. Moskof, Assistant United States Attorney, on brief), *for Appellee.*

FRIENDLY, *Circuit Judge*:

These three appeals, along with *United States* v. *Piccioli*, —— F.2d ——, and *United States* v. *Markis*, —— F.2d ——, this day decided, stem from a raid carried out by Internal Revenue Service agents and state police in Bridgeport, Connecticut, on October 8, 1964. Appellants Frank Costello, James "Totto" Marchetti and Arthur Gjanci were tried together and convicted on all counts before Chief Judge Timbers and a jury under four indictments. Three two-count indictments similar in form charged each of them with violations of 26 U. S. C.

§7203 in that, being engaged in the business of accepting wagers or receiving them for one so engaged, they wilfully failed (1) to purchase the occupational wagering tax stamp required by 26 U. S. C. §4411 and (2) to register as required by §4412. The fourth indictment charged all three with conspiring to fail to purchase the occupational tax stamps. Costello and Marchetti received concurrent one-year prison sentences and $10,000 fines in the conspiracy case and under Count 1 of their individual indictments; the imposition of sentence was suspended and probation for two years was imposed under Count 2. Gjanci's sentences differed in that the fine was $2,500.

Certain points are common to the three appeals and, to some extent, to the two others mentioned. After outlining the facts of this case, we shall deal first with these common points and then consider arguments peculiar to various appellants.

In the summer of 1964 Special Agent John Ripa of the I. R. S. was detailed to work in Bridgeport as an undercover agent, posing as a person wishing to make numbers and horse bets and later as a would-be bookmaker. He placed numerous bets with Gjanci and Marchetti at the Lafayette Diner or, in some instances with respect to Gjanci, at the Greek Coffee House. On October 2, he placed bets with Costello, paying with two marked $20 bills which were found in Costello's pocket on the latter's arrest. Earlier, on September 3, he had asked Gjanci if he could set up an arrangement to turn in bets and receive a commission. Gjanci said he would speak to Marchetti to arrange this, and also that he would talk to his "bosses—Totto and Frank" about letting Ripa place bets at a local variety store; Gjanci referred to Costello as the "big boss of Bridgeport." On September 9, Marchetti arranged for Ripa to "book on 50%" with "Tony," with settlement to be made with Marchetti. On several later instances Costello made in-

quiries and gave directions whence the jury could infer that he was indeed "a boss" — if not indeed "the boss," in the enterprise. At trial Costello denied any involvement in the wagering business; Marchetti admitted accepting some bets from Ripa but denied others and also denied Costello's involvement; Gjanci did not testify.

I.

Appellants' most basic point concerns the constitutionality of the federal wagering tax. Recognizing that these provisions were sustained in *United States* v. *Kahriger*, 345 U.S. 22 (1953), appellants say their situation differs in two respects. One is that statements of the prosecutor and the judge demonstrated that the purpose of the Government's applying the statute against them was not to collect revenue, concededly the only available source of federal power, but to promote the enforcement of state laws against gambling; the other is that the enlargement of the self-incrimination clause of the Fifth Amendment to include federal compulsion of the admission of crime against the states, see *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 53 n. 1, 77-78 (1964), overruling *United States* v. *Murdock*, 284 U.S. 141 (1931), and recent emphasis that the clause embraces all statements save those that "cannot possibly" tend to incriminate, see *Malloy* v. *Hogan*, 378 U.S. 1, 12 (1964), place the *Kahriger* holding on self-incrimination in question.[1]

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1 Marchetti makes an additional argument based on the 1958 amendment, 72 Stat. 1304, which added to §4401(c) a provision that any person required to register under §4412 who receives wagers for or on behalf of another without having registered the name and residence of the latter as §4412(a)(3) requires, shall himself be liable for the tax on wagers to the extent of his receipts. He contends that since §4412 requires registration by persons required to pay the special tax by §4411

With respect to the first contention, apart from questions as to what effect on constitutionality statements by prosecutors and judges can have, nothing in the present record goes materially beyond what the Supreme Court characterized in *Kahriger* as "suggestions in the debates that Congress sought to hinder, if not prevent, the type of gambling taxed." 345 U.S. at 27 n. 3. If "the verbal cellophane of a revenue measure," 345 U.S. at 38 (dissenting opinion of Mr. Justice Frankfurter), was sufficiently opaque for a majority of the Supreme Court twelve years ago, it remains so for us now. Whether the judge impermissibly allowed considerations unrelated to the nonpayment of the tax to enter into sentence, a claim raised only by Piccioli, is a different problem which we will discuss in the opinion in his case.

The contention with respect to the self-incrimination clause would be more serious if *United States* v. *Kahriger* stood alone, since whatever the stated basis for decision, the result followed so logically from the now-overruled *Murdock* doctrine. However, the Court again considered the Fifth Amendment objection in *Lewis* v. *United States*, 348 U.S. 419 (1955), which arose in the District of Columbia where wagering was a crime by federal law. The Court disposed of the argument on the basis that "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing com-

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and §4411 requires such payment from anyone who is liable for the percentage tax under §4401 or is engaged in receiving wagers for or on behalf of a person so liable, a cross-reference to §4412 in §4401 necessarily renders the statute circular and unintelligible. We see no force in this argument. The 1958 amendment did not affect who was required to pay the special tax and to register, see 3 U.S. Code Cong. & Ad. News 4457 (1958); it simply made persons who failed to comply with the special requirement of §4412(a)(3) liable for the tax on wagers imposed by §4401, when they would not previously have been.

pulsory about it, and, consequently, there is nothing violative of the Fifth Amendment." 348 U.S. at 422. If Congress can constitutionally require, as a condition to gambling, a registration that would show an intention to engage in a business prohibited by a federal law, we can think of no reason why it should not have the same power to require registration that would give notice of an intention to engage in activity made illegal by the laws of a state; and the probability of incrimination for future or even past acts, however great, is irrevelant on the Court's stated theory that the registration cannot be called compulsory. It is true that both *Kahriger* and *Lewis* were decided over vigorous dissents by Justices Black and Douglas on the Fifth Amendment point. But we find no subsequent opinion reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow. Cf. *United States* v. *Zizzo*, 338 F.2d 577, 580-81 (7 Cir. 1964), cert. denied, —— U.S. —— (1965); *United States* v. *Cefalu*, 338 F.2d 582 (7 Cir. 1964). We are therefore not required to consider other arguments on which the Government might rely, such as the lack of any claim of the privilege at an earlier stage, see *United States* v. *Sullivan*, 274 U.S. 259, 263-64 (1927); *United States* v. *Kahriger*, *supra*, 345 U.S. at 32, and the required records doctrine, see *Shapiro* v. *United States*, 335 U.S. 1 (1948); Meltzer, Required Records, the McCarran Act and the Privilege against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).

26 U.S.C. §4411: *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. §4412: *Registration*

(a) Requirement — Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district —

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company — Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information — In accordance with regulations prescribed by the Secretary, he or his delegate may require

from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

26 U.S.C. §4401: *Imposition of tax*

(a) Wagers.— There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager — In determining the amount of any wager for the purposes of this subchapter, all charges, incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax — Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name

and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

26 U.S.C. §7203: *Willful failure to file return, supply information or pay tax.*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016) keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be quilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

18 U.S.C. §3109: *Breaking Doors or Windows for Entry or Exit*

The officer may break open any outer or innet door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority or purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

§ 53-271. *Betting on horse race*

Any person who bets upon any horse race or is is stakeholder of anything staked upon any horse race shall be fined not more than fifty dollars.

§ 53-272. *Gaming on public conveyances*

Any person who plays at any game for any valuable thing, or solicits another to do the same, upon any public conveyance, or wins or loses any valuable thing by so playing or betting on such play or by sharing in any stake or wager of others who so bet or play, shall be fined not more than two hundred dollars and imprisoned not more than six months.

§ 53-273. *Gaming house; keepers*

Any person who keeps a place resorted to for the purpose of gaming, or which is reputed to be a gaming house or place frequented for the purposes of gaming, or engages in playing of any game for any valuable thing or resides in or frequents such place for such purposes, shall be fined not more than one hundred dollars or imprisoned not more than six months or both.

§ 53-274. *Gaming house; frequenters*

Any person who enters, except for a legitimate purpose, a place resorted to for the purpose of gaming, or which is reputed to be gaming house or place frequented for the purpose of gaming, shall be deemed to be a frequenter thereof and shall be subject to the penalties provided in section 53-273.

§ 53-275. *Owning faro bank*

Any person who owns, or has any share, part or interest in, any faro bank or fund, raised or established for gaming, shall be fined not more than one hundred dollars.
§ 8653.)

§ 53-276. *Witness not excused*

No person summoned as a witness on the part of the state, in any prosecution under section 53-273, 53-274 or 53-275, shall be excused from testifying because his evidence may tend to disgrace and criminate him; nor shall he thereafter be prosecuted for anything connected with the transaction about which he so testifies.

§ 53-277. *Gaming in general*

Any person who plays at any game elsewhere than on a public conveyance or in a reputed gaming house, for any valuable thing, shall be fined not more than five dollars.

§ 53-278. *Keeping billiard table or slot machine for gambling purpose*

Any person who keeps a billiard table which is used for the purpose of gaming, or a slot machine which is used or designed for the purpose of a lottery or gaming, or which is used or designed to discharge with or without merchandise any tokens that may be used for further operation of a slot machine or for exchange, or which is used or designed to display any symbol entitling any person by reason of such display to receive merchandise or money, shall be fined not more than five hundred dollars or imprisoned not more than one year or both. Any person who collects or receives any money from a billiard table

or a slot machine, or for the use thereof, while the same is kept or used as herein provided, shall be fined not more than five hundred dollars or imprisoned not more than one year or both.

§ 53-279. *Arrest of keeper of gambling equipment; seizure of device*

Any sheriff, deputy sheriff, constable, chief of police or police officer may, within his precinct, arrest, without a warrant, any person whom he finds in possession of any slot machine, gambling device or other equipment, paraphernalia, papers, books or money, used for gambling, or used or designed in violation of the provisions of section 53-278, and seize such slot machine or other device found in the possession of such person, and may detain such person and such device in some place of safe-keeping until warrants can be procured for the arrest of such person and the seizure of such slot machine or other device. The officer making such arrest or seizure shall immediately make complaint to the proper prosecuting officer, who shall forthwith make his written complaint to some judge having jurisdiction, and such judge shall issue his warrant, based on such complaint, and in case of seizure, action shall then be taken thereon pursuant to the provisions of sections 54-33 and 54-35.

§ 53-295. *Pool selling*

Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools upon the result of any trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the

result of any game, competition, political nomination, appointment or election, whether such trial, contest, game, competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, is permitted or carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of selling pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or in carrying on the business of the transmission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, and any person who, being the owner, lessee or occupant of any building, room, park, ground, enclosure or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, shall be fined not more than five hundred dollars or be imprisoned not more than one year or be both fined and imprisoned; and each day of such owning, keeping, occupying, permitting or transmitting shall constitute a separate offense. Any person who becomes the custodian or depositary of any pools, money, property or thing of value, in any manner wagered or bet upon such result, or of any apparatus of any kind used for the purpose of assisting in buying or selling any such pools or making any such wagers or bets, shall be punished in like manner. The provisions of this section shall not prohibit the giving of purses or premiums for any trial or contest of skill, speed or endurance of man, beast, bird or machine and the charging of an admission or entrance fee to any contestant in any such trial or contest.

§ 53-296. *Baseball or football pools*

Any person who, by himself, his servant or agent, directly or indirectly, makes any pool, wager or bet upon a football or baseball game, or upon any element thereof, shall be fined not more than one hundred dollars for the first offense and not more than one thousand dollars or imprisoned not more than one year or both for any subsequent offense.

§ 53-297. *Sale or lease of implements to be used in pool-selling*

Any person, whether acting for himself or as agent or servant, who sells, leases, lends or gives to the owner of any pool room, or to the servant or agent of any such owner, or who installs or operates in any room or building, any telegraph, telephone or ticker instrument or machine, or other similar apparatus, with knowledge or intent that such instrument, machine or apparatus is to be used for receiving, transmitting or recording bets or wagers, or for receiving, transmitting or recording the name of any horse or jockey participating in horse-racing upon which bets are or are to be placed, and any owner or lessee of any room or building in which pool-selling of any kind, either directly or indirectly, is permitted or carried on, or in which wagers are placed upon any game, sport, competition, nomination, appointment or election, within or outside this state, who permits the operation of any such machine, instrument or apparatus in such room or building after notice thereof from any officer of the community in which such room or building is situated, shall be fined not more than five hundred dollars or imprisoned not more than one year or both.

§ 54-197. *Conspiracy*

Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful

means, or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement, shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both, provided, if the crime which is the object of such combination, confederation or agreement is a misdemeanor, such person shall be subject to the same penalty as is provided by statute for the commission of the misdemeanor. No officer or member of any lawful organization shall he held liable for the unlawful acts of individual officers, members or agents of such organization except upon proof of participation in or authorization of such acts or of the ratification thereof.

UNITED STATES OF AMERICA *vs.* The premises known as Apartment C-9, being on the third floor on the North side of the building known as the Shelton Apartments, 2225 Main Street, Bridgeport, Connecticut.	Commissioner's Docket No. 1 Case No. 424 Affidavit for Search Warrant

AFFIDAVIT FOR SEARCH WARRANT

I, Thomas E. Grillo, being duly sworn according to law, depose and say that I am a Special Agent assigned to the Intelligence Division of the Internal Revenue Service, United States Treasury Department at Bridgeport, Connecticut, and I have devoted a great deal of time and work in investigation and undercover work in connection with violations of the Wagering Tax Laws, and in particular, those violations having to do with horse racing, numbers, lotteries, sporting events and similar gambling activities, and as a result I am familiar with

practices, methods, and operations of horse betting, lotteries, numbers betting and sporting event betting which is conducted contrary to and in violation of the law.

Since August 1963, I, and other Special Agents of the Internal Revenue Service, have been assigned to investigate violations of the Wagering Tax Laws in the area of Bridgeport, Connecticut.

As a result of this investigation, I have reason to now believe that on the premises hereinbefore described, there are now being concealed certain records, papers, writings, slips, radios, books, newspapers primarily reporting results and information on horse races and other sporting activity, markings, writing materials, racing forms, cash monies, machines and equipment, all of which are being used in violation of Title 26, United States Code, Sections 4401, 4411, 4412, 7203 and 7262.

The facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

1. On September 22, 1964, I received information from a reliable source who had furnished reliable information to me in the past, that Albert Moretti is presently engaged in bookmaking activities with regard to horse races and numbers lotteries.

2. On July 30, 1964, I received information from another reliable source who had furnished reliable information in the past that Albert Moretti is operating as a bookmaker in Bridgeport using telephone number 367-8261.

3. The records of the Southern New England Telephone Company reveal that telephone number 367-

8261 is located at the premises known as Apartment C-9, 2225 Main Street, Bridgeport, Connecticut and is listed in the name of Albert Moretti.

4. As a Special Agent of the Intelligence Division of the Internal Revenue Service, I am familiar with the fact, from investigations in the recent past and from searches which resulted from these investigations, that a pattern of long distance toll calls to and from known and reputed bookmakers from a location used by known bookmakers is indicative of the fact that the latter premises is being used to carry on the business of bookmaking.

5. Special Agent Victor D. Palaza informed me that he had ascertained, from the long distance toll call statements of the Southern New England Telephone Company for April through September, 1964, that Albert Moretti had received 475 long distance toll calls at the above-described premises, from George Miller, Hoyt Road, Bethel, Connecticut, and that George Miller is known to be a bookmaker. Further, the long distance toll call statements of the Southern New England Telephone Company for May through August, 1964, indicated that George Miller, Hoyt Road, Bethel, Connecticut, received 64 long distance toll calls from Albert Moretti. Further, the long distance toll calls statements of the Southern New England Telephone Company for the months of May through June indicated that Albert Moretti had received, at the above-described premises, 67 long distance toll calls from Jeannette Rich, 50 George Street, West Haven, Connecticut. Jeannette Rich is known to be a bookmaker. Special Agent Palaza further informed me that he had prepared a chart reflecting long distance telephone calls between bookmaking locations, which I attach to this affidavit and which Mr. Palaza has stated is accurate. This information Special Agent Palaza gave me as a

regular course of reporting information to me, as a part of the investigation of bookmaking in the District of Connecticut.

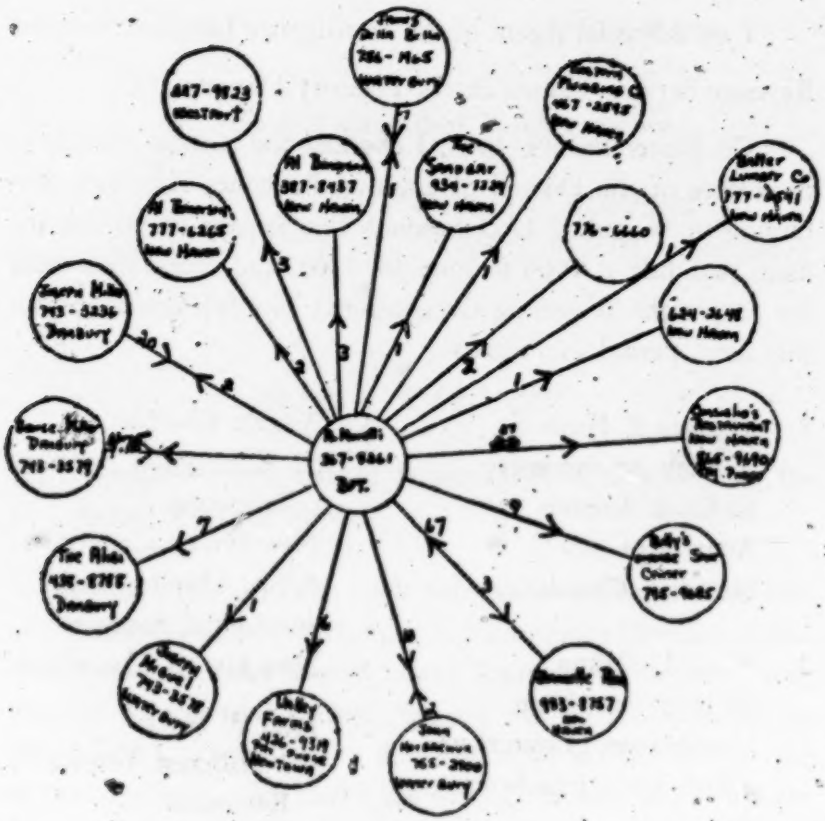
Attached and with reference to this affidavit is a supplemental affidavit of Special Agent George Politis, who has made a check of the records of the District Director of Internal Revenue in Hartford, Connecticut, which records reflect that only 8 Wagering Occupational Tax Stamps have been issued for the current fiscal year, and that the names of none of the within-mentioned persons are reflected on said records.

From all the foregoing and from my experience and observations and investigations of the above, I believe and allege that the hereinbefore described premises is being used by said Albert Moretti and others to conceal and secrete certain property and equipment, as hereinbefore described, for the purpose of violating the law, as stated hereinbefore.

THOMAS E. GRILLO
Special Agent

Sworn to before me and subscribed in
my presence, Oct. 1, 1964

GEORGE C. HASTINGS
United States Commissioner



Toll Calls

Key — Outgoing 1-1-64 — 8-24-64

Incoming April - May

AFFIDAVIT

DISTRICT OF CONNECTICUT
UNITED STATES OF AMERICA } ss.:

I, George Politis, being duly sworn, depose and say:

I am a Special Agent of the Intelligence Division, Internal Revenue Service, United States Treasury Department.

On September 29, 1964, I checked the current records at the Office of the District of Internal Revenue, Hartford, pertaining to Wagering Occupational Tax Stamps issued for the fiscal year July 1, 1964 to June 30, 1965, and found that there are only eight Wagering Occupational Tax Stamps issued for this fiscal period as follows:

1. Thomas E. Forte, Sr.
   Ardsley Apartments
   32 Cook Avenue
   Apartment 309
   Meriden, Connecticut

2. Frank DePalma
   64 Highview Lane
   New Haven, Connecticut
   d/b/a Lee's Luncheonette
   102 Wooster Street
   New Haven, Connecticut

3. Dominic Sapere
   39 Judson Avenue
   East Hartford,
   Connecticut

4. Angelo Chieppo
   82 Huntington Avenue
   Extension
   New Haven, Connecticut
   d/b/a Chip's Arcade
   361 Grand Avenue
   New Haven, Connecticut

5. John B. Macri
   323 Hillcrest Terrace
   Extension
   Meriden, Connecticut

6. Charles DeMartin
   108 John Street
   East Haven, Connecticut
   d/b/a D M Variety Store
   403½ Grand Avenue
   New Haven, Connecticut

7.	Frank A. DeRosa 27 Summit Street Derby, Connecticut	New Haven, Connecticut d/b/a Elm Haven Market
8.	Eugene Marchitto 142 Howe Street	148½ Dixwell Avenue New Haven, Connecticut

GEORGE POLITIS
Special Agent

Sworn to before me and subscribed in my presence,
Oct. 1, 1964.

GEORGE C. HASTINGS
United States Commissioner

SEARCH WARRANT

To: Special Agents, United States Treasury Department, Internal Revenue Service.

Affidavits having been made before me by Thomas E. Grillo and George Politis, Special Agents, Intelligence Division, Internal Revenue Service, United States Treasury Department, that they have reason to believe that on the premises known as Apartment C-9 which is on the third floor on the North side of the building known as the Shelton Apartments at 2225 Main Street, in the City of Bridgeport, in the District of Connecticut, there are now being concealed certain records, papers, writings, slips, books, newspapers primarily reporting results and information of horse races and other sporting activity, markings, writing materials, racing forms, cash monies, machines and equipment, all of which are being used in violation of Title 26, United States Code, Sections 4401, 4411, 4412, 7203 and 7262,

and as I am satisfied that there is probable cause to believe that the property so fitted and intended to be used is being concealed on the premises above described,

You are hereby commanded to search the place named for the property specified, serving this warrant and making the search in the daytime, and if the property be found there to seize it, prepare a written inventory of the property seized and bring the property before me.

Dated this 1st of October, 1964.

GEORGE C. HASTINGS
United States Commissioner

INFORMATION

The United States Attorney, through the Assistant United States Attorney, charges:

COUNT ONE

ALBERT P. MORETTI, of Bridgeport in the District of Connecticut, on divers dates from on or about July 1, 1964, through on or about October 8, 1964, at Bridgeport, Connecticut in said District did engage in the business of accepting wagers as defined in 26 United States Code 4421, and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 United States Code 4401, having wilfully failed prior to engaging in said business and receiving said wagers to pay the special occupational tax as required by 26 United States Code 4411, due and owing the United

States of America for the year ending June 30, 1965, in violation of Title 26, United States Code, Section 7203.

COUNT TWO

ALBERT P. MORETTI, of Bridgeport in the District of Connecticut, on divers dates from on or about July 1, 1964, through on or about October 8, 1964, at Bridgeport, Connecticut in said District did engage in the business of accepting wagers as defined in 26 United States Code 4421, and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 United States Code 4401, having wilfully failed prior to engaging in said business and receiving said wagers to register as required by 26 United States Code 4412, in violation of Title 26, United States Code, Section 7203.

F. OWEN EAGAN
United States Attorney

HOWARD T. OWENS, JR.
Assistant United States Attorney

AFFIDAVIT

STATE OF CONNECTICUT }
COUNTY OF NEW HAVEN } ss. New Haven, January 8, 1965

I, Antonio J. Lupino, state that I reside at 128 Princeton Street, Hartford, Connecticut and that I have been a Special Agent, Intelligence Division, Internal Revenue Service since March 1955.

At approximately 1:15 p.m. on Thursday, October 8, 1964, accompanied by Lt. Thomas O'Brien of the Connecticut State Police Department, armed with a search warrant I went to apartment C-9, 2225 Main Street, Bridgeport, Connecticut. After ringing the bell and getting no reply I then knocked on the door and shouted "open up. I'm a Federal Officer with a Search Warrant". There was no reply so I turned the door knob and finding the door locked I instructed Lt. O'Brien to force his way in. Lt. O'Brien used a sledge hammer and had to strike numerous times before the door finally gave way.

ANTONIO J. LUPINO

Subscribed and sworn to before me
this 8th day of January, 1965

.....

Commissioner of the Superior Court

SUPPLEMENTAL AFFIDAVIT

STATE OF CONNECTICUT }
COUNTY OF NEW HAVEN } ss. New Haven, January 14, 1965

The procedures followed by myself and the officer who accompanied me to apartment C-9, 2225 Main Street, Bridgeport, Connecticut, are as follows:

Upon arriving at the apartment I first rang the door bell. I did not get a reply. I then knocked two or three times on the door, and again I did not get a reply. I then shouted "Open up, I am a Federal officer with a search warrant", and there

was no reply so I tried the door-knob and found the door locked. I then instructed Lt. O'Brien to force his way in.

The time that elapsed after I first rang the door bell to the time I instructed Lt. O'Brien to force his way in was approximately twenty to twenty-five seconds. I felt that this period of time gave the occupant of the apartment sufficient opportunity to open the door if he desired to do so.

/s/ ANTONIO J. LUPINO
ANTONIO J. LUPINO

Subscribed and sworn to before me
this 14th day of January, 1965.

.....
Commissioner of the Superior Court

U.S. Treasury Department—Internal Revenue Service

FORM 11-C
Rev. July 1953

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on reverse for time and place for filing return)

Return for period from ..... to June 30, 19.....
(Month, day, and year)

Check one: ☐ First return and application ☐ Renewal return and application ☐ Supplemental return and application

For District Director's Use Only

a. (Serial number)

(Date issued)

(Registration number)

Tax..... $.....
Penalty..... $.....
Interest..... $.....
Total..... $

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

1. Name: True name .....

Alias, style, or trade name, if any .....

2. Address: Residence .....
(Number and street)

(City) (County) (State)

Business .....
(Number and street)

(City) (County) (State)

3. If this is a supplemental application, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address

5. Are you or will you be engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No
(Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

Name of location	Street address	City and State

(b) Number of employees and/or agents engaged in receiving wagers on your behalf .....

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. in present use	Street address	City and State

6. Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? ☐ Yes ☐ No
(Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

....., 19..... .....
(Date) (Signature)

(Show whether individual owner, member of firm, or if corporation officer, give title)

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 951

ALBERT P. MORETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted upon his plea of *nolo contendere* to one count of a two-count information charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by § 4412. He was sentenced to imprisonment for four months and probation for two years, and fined $3,000. The second count was dismissed on the government's motion.

Petitioner was one of approximately forty-five individuals arrested on October 8, 1964 in connection with a coordinated campaign against violators of the Wagering Tax Statute in the Bridgeport, Connecticut area. He challenges the constitutionality of the

207-705—66

statute when measured against the Fifth Amendment, advancing contentions which are the same as those raised in the petition filed this term by James Marchetti (No. 823), Frank Costello (No. 826) and Arthur Gjanci (No. 1028 Misc.). Those contentions are answered by our combined brief in response to the cited petitions. See, also, *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838.

Additionally, he attacks the denial of his pretrial motion to suppress, contending that the affidavits in support of the search warrant were insufficient to establish probable cause and that the forcible entry into his apartment in execution of the warrant was not authorized by 18 U.S.C. 3109. His contentions in this respect, however, were mooted by his plea of *nolo contendere*. Had he gone to trial instead of so pleading, the trial court might have reversed its interlocutory pretrial determination and excluded the evidence (see *Cogen* v. *United States*, 278 U.S. 221, 224; *Gouled* v. *United States*, 255 U.S. 298, 312–313), the prosecution might have foregone its use, or, despite its admission, the jury might have acquitted.

In any event, the motion was properly denied. The affidavits in support of the application for the warrant, in addition to relating the statements of two reliable informants that petitioner was engaged in bookmaking activities (Pet. App. 38a) and stating the grounds for belief that he did not possess the necessary tax stamp (Pet. App. 42a–43a), showed that over a six month period he had received 542 long-distance toll calls from two known bookmakers

and that over a four-month period he had placed 64 long-distance toll calls to one of said bookmakers (Pet. App. 39a). The commissioner was thus supplied with sufficient information "to assess independently the probability that petitioner committed the crime charged." *Giordenello* v. *United States*, 357 U.S. 480, 487; see also *Jaben* v. *United States*, 381 U.S. 214, 224–225; *Jones* v. *United States*, 362 U.S. 257. Execution of the warrant was attempted at 1:15 p.m. (Pet. App. 46a), which is during the usual period of the day when wagers are placed and accepted by telephone. The agent thus had reasonable grounds to believe that petitioner was present in his apartment carrying on his bookmaking activities, and that the lack of response to the ring of the doorbell, knock on the door, and announcement of authority indicated refusal of admittance (as it in fact did) and not that the apartment was unoccupied. Compare *United States* v. *Viale*, 312 F. 2d 595, 602 n. 6 (C.A. 2), certiorari denied, 373 U.S. 903.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 43

STANLEY MARKIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 64

ALBERT P. MORETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

As we advised the Court in our Supplemental Memorandum in *Schipani* v. *United States*, No. 504, this

Term, 385 U.S. 372, the government has been conducting an extensive review to ascertain whether illegal monitoring affected any cases which had been brought to trial. We have recently been advised by the Internal Revenue Service that wiretapping took place in the two above-captioned cases and we have concluded, for the reasons set forth below, that this conduct may have affected the convictions.

Petitioner Markis was convicted by a jury on a two-count indictment charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational gambling tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by 26 U.S.C. 4412. He was sentenced to imprisonment for one year and fined $10,000 on the first count, and he received a suspended sentence and probation for two years on the second count.

Petitioner Moretti was convicted upon his plea of *nolo contendere* to the first count of a two-count information charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp and by willfully failing to register. He was sentenced to imprisonment for four months and probation for two years, and fined $3,000. The second count was dismissed on the government's motion.

Beginning in early 1964 internal revenue agents, who placed numerous bets with one John Mento at the latter's service station, saw Mento dial telephone number 336-0254, ask for "Joe" or "Stash," and repeat the bet. Telephone company records disclosed that the number was an unlisted one in the name of

"Mrs. Peggy D'Onofrio," Apartment C-6, 2225 Main Street, Bridgeport, Connecticut, and investigation by revenue agents disclosed no person of that name living at that address. The agents, however, observed petitioner Markis (whose name they did not know at the time)[1] regularly unlock the apartment and enter it at 11:00 or 11:30 a.m., carrying pads, scratch sheets and newspapers, and remain until 4:45 p.m.; the time Markis spent at the apartment was the usual period of the day for placing and accepting bets by telephone (Gov. C.A. App. 3a-7a). The records of the district Internal Revenue office disclosed that only eight persons in the State of Connecticut possessed wagering tax stamps at the time, and that none of them resided or had a place of business in Bridgeport (Gov. C.A. App. 8a-9a).

Meanwhile the agents received information that petitioner Moretti was accepting bets on the same floor of the same apartment building. Because of the coincidence of location, an agent of the Internal Revenue Service, some time in July, 1964, tapped the telephone of both apartments. So far as we can determine, no written or other record was made of any of the information obtained. The agent who conducted the wiretap could not identify any of the persons involved in the overheard conversations, but did orally inform the agent-in-charge that bets were being accepted in each of the two apartments by two separate persons.

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[1] Petitioner was later introduced by the nickname "Stash" to an agent who placed bets with Mento (Pet. App. 2a-3a).

Further investigation was conducted with respect to the two petitioners. On the basis of recitations referring to the results of this further investigation, search warrants were thereafter obtained for both apartments. The warrants were executed in early October 1964. The affidavits in support of the warrants did not disclose that there had been wiretapping. Petitioners' pretrial motions to suppress the evidence obtained during the ensuing searches were denied. Petitioner Moretti then entered a plea of *nolo contendere;* petitioner Markis was tried and convicted. The searches produced evidence used against petitioner Markis at trial and evidence which could have been used against petitioner Moretti if he had not pleaded *nolo contendere.* Both petitioners appealed and their convictions were affirmed. Both then filed petitions for writs of certiorari and the government filed memoranda in opposition. The cases are still pending in this Court.

Although none of the conversations overheard by means of wiretaps were offered as evidence against petitioners at trial or in obtaining the search warrants, the information obtained from the wiretap confirmed the agents' belief that both petitioners were engaging in gambling without a federal tax stamp. Also, the knowledge gained by the wiretapping apparently facilitated the continuing investigation and the procurement of the information recited in the affidavits presented in support of the application for the search warrants. Thus we cannot say with assurance that the evidence obtained by these searches was untainted. We therefore conclude that it would be appropriate for the Court to grant certiorari in these

two cases, vacate the judgments of the court of appeals, and remand the causes to the district court for a new trial, should the government seek to prosecute petitioners anew.[2]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

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[2] Petitioners are two of approximately forty-five individuals arrested on October 8, 1964, in connection with a coordinated campaign against violators of the Wagering Tax statute in the Bridgeport, Connecticut, area. A number of the individuals whose indictments resulted from these raids ultimately filed petitions in this Court. The case of petitioner Marchetti, No. 38, this Term, is *sub judice*; petitions for certiorari in Nos. 41, 44, 55, 56, and 27 Misc., this Term, are presently pending. Investigation discloses that there was no illegal monitoring affecting any of the defendants in these cases and that the monitoring described in the text provided no leads with respect to any of them.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 262178 656

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

MARKIS *v.* UNITED STATES; AND MORETTI *v.* UNITED STATES.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 43 and 64. Decided May 29, 1967.

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments vacated and the cases remanded to the United States District Court for the District of Connecticut for a new trial, should the Government seek to prosecute petitioners anew. *Nardone* v. *United States*, 302 U. S., 379; *Nardone* v. *United States*, 308 U. S. 338.